91-1485

Supreme Court, U.S.
FILED
MAR 9 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARC RICH,

Petitioner,

vs.

ACTION S.A. and DELTAMAR ESTABLISHMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ANDREW L. DEUTSCH
Counsel of Record
CAROL M. FISCHER
ROBERT A. MEISTER
MILGRIM THOMAJAN & LEE P.C.
53 Wall Street
New York, New York 10005
(212) 858-5300

Attorneys for Petitioner

Questions Presented

1. Does execution of a sworn oath renouncing United States nationality as part of a person's voluntary naturalization under a foreign country's laws

(a) establish as a matter of law that the person has become a "citizen or subject of a foreign state" for purposes of 28 U.S.C. §1332(a), or

(b) establish the person's specific intent to relinquish United States nationality, as held by the Seventh Circuit in *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981), and the Ninth Circuit in *Richards v. Secretary of State*, 752 F.2d 1413 (9th Cir. 1985)?

2. Is a person who is a dual national of both Spain and the United States a "citizen or subject of a foreign state" under 28 U.S.C. §1332(a)?

Parties to the Proceeding

The names of all the parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.*

---

* Petitioner is unaware of the identities of the parent corporations and subsidiaries of the corporate plaintiffs, if any.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Opinions Below 1

Jurisdiction 1

Statutory Provisions 1

Statement of the Case 1

Introduction 1

The Parties 3

The Controversy 4

The Proceedings Below 5

Reasons For Granting the Writ 9

I **THE SECOND CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW -- WHO IS A FOREIGN CITIZEN FOR DIVERSITY PURPOSES -- IN A WAY WHICH IGNORES TRADITIONAL DIVERSITY RULES, MISCONSTRUES FEDERAL LAW, AND MISAPPLIES A DECISION OF THIS COURT** . . . 9

A. **The Accepted Test For Foreign Citizenship: Did Spain Regard Mr. Rich as Its Citizen?** 9

TABLE OF CONTENTS - Continued

Page

B. 8 U.S.C. §1481(c) and *Terrazas* Do Not Require Proof of A Specific "Intent to Expatriate" in Diversity Cases 12

C. The Consequences of the Decision Below . . 18

II THE DECISION BELOW CONFLICTS WITH THE SEVENTH AND NINTH CIRCUITS' HOLDINGS THAT A SPECIFIC "INTENT TO EXPATRIATE" IS ESTABLISHED BY PROOF OF RENUNCIATION OF U.S. CITIZENSHIP AS PART OF A VOLUNTARY FOREIGN NATURALIZATION 20

III THE SECOND CIRCUIT'S DECISION RESOLVES AN IMPORTANT QUESTION OF FEDERAL LAW -- WHETHER A "DUAL CITIZEN" IS ONLY A CITIZEN OF THE UNITED STATES FOR DIVERSITY JURISDICTION PURPOSES -- IN A WAY WHICH CONFLICTS WITH ESTABLISHED PRINCIPLES OF DIVERSITY JURISPRUDENCE . 24

Conclusion 26

TABLE OF CONTENTS - Continued

Page

APPENDIX A - OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 11, 1991 . . . 1a

APPENDIX B - MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 18, 1985 . . . . . 10a

APPENDIX C - OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 19, 1987 . . . . . 12a

APPENDIX D - STATUTORY PROVISIONS 31a

APPENDIX E - EXCERPT FROM THE HOUSE OF REPRESENTATIVES' REPORT TO S. 2237, H.R. REP. NO. 1986, 87TH CONGRESS, 1ST SESSION (1961) . 36a

APPENDIX F - AMENDED COMPLAINT DATED AUGUST 2, 1983 . . . . . 39a

APPENDIX G - AFFIDAVIT OF MARC RICH DATED FEBRUARY 6, 1985 WITH EXHIBITS 49a

APPENDIX H - AFFIDAVIT OF RICHARD S. HOFFMAN DATED FEBRUARY 11, 1985 WITH EXHIBITS 72a

TABLE OF CONTENTS - Continued

Page

APPENDIX I - CERTIFIED TRANSLATION OF THE AFFIDAVIT OF JAVIER GOMEZ-ACEBO SAENZ DE HEREDIA DATED MAY 25, 1987 . . . . . 80a

TABLE OF AUTHORITIES

Page

Cases:

Afroyim v. Rusk,
387 U.S. 253 (1967) 16

Blair Holdings Corp. v. Rubinstein,
133 F. Supp. 496 (S.D.N.Y. 1955) 11

Carden v. Arkoma Associates,
494 U.S. 185 (1990) 9, 25

Costello v. United States,
365 U.S. 265 (1961) 17

Cunard Line Ltd. v. Abney,
540 F. Supp. 657 (S.D.N.Y. 1982) 25

Ed & Fred, Inc. v. Puritan Marine Insurance Underwriters Corp.,
506 F.2d 757 (5th Cir. 1975) 10

Ex parte Edelstein,
30 F.2d 636 (2d Cir.),
cert. denied, 279 U.S. 851 (1929) 25

Eze v. Yellow Cab Co.,
782 F.2d 1064 (D.C. Cir. 1986) 10

Faysound Ltd. v. United Coconut Chemicals, Inc.,
878 F.2d 290 (9th Cir. 1989) 10

TABLE OF AUTHORITIES - Continued

Feres v. United States,
340 U.S. 135 (1950) 15

Freeman v. Northwest Acceptance Corp.,
754 F.2d 553 (5th Cir. 1985) 12

FreePort-McMoRan, Inc. v. K N Energy, Inc.,
111 S.Ct. 858 (1991) 12

Hodgson v. Bowerbank,
9 U.S. (3 Cranch) 303 (1809) 10

Jerguson v. Blue Dot Investment, Inc.,
659 F.2d 31 (5th Cir. Unit B 1981),
cert. denied, 456 U.S. 446 (1982) 25

Kahane v. Schultz,
653 F. Supp. 1486 (E.D.N.Y. 1987) 24

Kuehne & Nagel (AG & Co.)
v. Geosource, Inc.,
874 F.2d 283 (5th Cir. 1989) 12

Liakakos v. CIGNA Corp.,
704 F. Supp. 583 (E.D. Pa. 1988) 19

McNutt v. General Motors Acceptance Corp.,
298 U.S. 178 (1936) 17

Medvedieff v. Cities Service Oil Co.,
35 F. Supp. 999 (S.D.N.Y. 1940) 11

TABLE OF AUTHORITIES - Continued

Murarka v. Backrack Bros.,
215 F.2d 547 (2d Cir. 1954) 10

Navarro Savings Ass'n. v. Lee,
446 U.S. 458 (1980) 25

Nazareth Candy Co., Ltd. v. Sherwood Group, Inc.,
683 F. Supp. 539 (M.D.N.C. 1988) 19

Nishikawa v. Dulles,
356 U.S. 129 (1958) 14, 15

Richards v. Secretary of State,
752 F.2d 1413 (9th Cir. 1985) . . . . . i, 7, 10, 20, 22

Sadat v. Mertes,
615 F.2d 1176 (7th Cir. 1980) 19

Smith v. Arundel Cooperative, Inc.,
660 F. Supp. 912 (D.D.C. 1987) 25

Strawbridge v. Curtiss,
7 U.S. (3 Cranch) 267 (1806) 9

Terrazas v. Haig,
653 F.2d 285 (7th Cir. 1981) . . . . . i, 20, 21

United States v. King,
44 U.S. (3 How.) 773 (1845) 11

TABLE OF AUTHORITIES - Continued

United States v. Matheson,
400 F. Supp. 1241 (S.D.N.Y. 1975),
aff'd, 532 F.2d 809 (2d Cir.),
cert. denied, 429 U.S. 823 (1976) 23, 24

United States v. Ron Pair Enterprises, Inc.,
489 U.S. 235 (1989) 13, 16

United States v. Wong Kim Ark,
169 U.S. 649 (1898) 11

Vance v. Terrazas,
444 U.S. 252 (1980) . . . . . *passim*

Yoncoskie v. Delaware River
Port Authority,
528 F.2d 722 (3d Cir. 1975) 25

Statutes, Codes and Regulations:

8 U.S.C. §1481(a) (1982) 1, 13, 23

8 U.S.C. §1481(b) (1986) 13

8 U.S.C. §1481(c) (1982) . . . . . *passim*

8 U.S.C. §1503(a) (1988) 14

28 U.S.C. §1254(1) (1988) 1

TABLE OF AUTHORITIES - Continued

28 U.S.C. §1332 (1988) 1, 5, 6

28 U.S.C. §1332(a) (1988) . . . . . *passim*

22 C.F.R. §7.3 (1991) 13

22 C.F.R. §50.52 (1991) 13

Fed. R. Civ. P. 41(b) 17

Fed. R. Civ. P. 12(b)(1) 1

Fed. R. Civ. P. 12(h)(3) 1, 12, 17

Fed. R. Civ. P. 19 . . . . . 1, 12

Texts and Other Authorities

1 James W. Moore, et al., *Moore's Federal Practice* (1991 ed.) 11, 25

13B Charles A. Wright, et al., *Federal Practice & Procedure*, (1984) 11

Remarks of the Chief Justice Before the House of Delegates at the American Bar Association's Mid-Year Meeting (February 4, 1992) 18

TABLE OF AUTHORITIES - Continued

Remarks of the Chief Justice,
Proceedings of the Fifty-First
Judicial Conference of the District
of Columbia Circuit
(May 22, 1990),
reprinted at 134 F.R.D. 463 18

S. 2237, *H.R. Rep. No. 1986*,
87th Cong., 1st Sess. (1961) 14, 15

The Federalist No. 80,
(A. Hamilton) (I. Kramnick ed. 1987) 10

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 951 F.2d 504 (2d Cir. 1991) and is set forth at pages 1a - 9a of the Appendix to this Petition. The opinions of the United States District Court for the Southern District of New York relevant to the writ requested are not officially reported; they are set forth at pages 10a - 30a of the Appendix.

Jurisdiction

The judgment of the court of appeals was entered on December 11, 1991. This petition is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1988), as an appeal from a judgment of a court of appeals. Federal jurisdiction was alleged in the district court pursuant to 28 U.S.C. §1332, as this was alleged to be an action between citizens or subjects of a foreign state and citizens of a State.

Statutory Provisions

8 U.S.C. §1481(a) (1982) and 8 U.S.C. §1481(c) (1982) (amended and redesignated as 8 U.S.C. §1481(b) in 1986); 28 U.S.C. §1332(a) (1988); and Federal Rules of Civil Procedure 12(b)(1), 12(h)(3) and 19 are set forth at pages 31a - 35a of the Appendix.

Statement of the Case

Introduction

Well prior to being sued in this action, petitioner ("Mr. Rich") was naturalized under the laws of Spain and swore an

oath before Spanish authorities formally renouncing his former United States nationality. He sought dismissal of the alien plaintiffs' amended complaint on grounds that complete diversity of citizenship was absent. Yet the district court held that it had diversity jurisdiction and entered a default judgment against Mr. Rich, and the Second Circuit affirmed. Relying on 8 U.S.C. §1481(c) (1982) (renumbered as §1481(b) in 1986), and this Court's decision in *Vance v. Terrazas*, 444 U.S. 252 (1980) ("*Terrazas*"), the Second Circuit held that Mr. Rich remained a United States citizen for diversity purposes unless it was shown that he had a specific intent to relinquish U.S. citizenship at the time of his expatriating acts. It held that this specific intent was not proven by Mr. Rich's swearing an oath renouncing United States nationality in the course of a voluntary foreign naturalization. It alternatively held that if Mr. Rich were considered a dual citizen of the United States and Spain, only his United States citizenship should be given effect for diversity purposes.

This Court should review the decision below, which wrongly decides several important issues of federal law. The decision abolished a long-standing "bright-line" test for determining who is a "citizen of a foreign state" for diversity purposes: whether a foreign country regards the individual as one of its citizens. In so doing, it misapplied to issues of diversity jurisdiction a statute enacted solely to prescribe the Government's burden in expatriation proceedings. The Second Circuit also seriously misinterpreted this Court's decision in *Terrazas*, transplanting constitutional considerations relevant only to expatriation proceedings into the field of diversity jurisdiction. The decision effectively expands the scope of diversity jurisdiction, at a time when the Chief Justice and other prominent jurists have called for a reduction in diversity jurisdiction to ease the burden it imposes on the federal courts. The Court should also grant certiorari to resolve the conflict between the decision below

and rulings of the Seventh and Ninth Circuits, both of which hold that an individual's specific intent to expatriate himself or herself is established when -- like Mr. Rich -- he or she takes a formal oath renouncing U.S. nationality in the course of a foreign naturalization proceeding.

The Parties

Mr. Rich was naturalized as a U.S. citizen in 1946. (14a). On July 26, 1982, upon his application, the Spanish Ministry of Justice issued a certificate granting him Spanish citizenship, upon the condition that he appear "before the competent official to renounce his previous nationality and to give oath of fidelity to the Head of State." (74a). On August 16, 1982, Mr. Rich appeared before a Spanish district judge in Madrid, Spain, and signed a sworn document stating that he "swears the oath of fidelity to the King and to obey Spanish Law which oath is given in the legal form and the Appearer [Mr. Rich] renounces his USA nationality." (76a). Mr. Rich was issued a Spanish passport and national identity card on September 22, 1982 (20a), and his acquisition of Spanish citizenship was published in the Official State Gazette of Spain on February 11, 1983. As evidence of his Spanish citizenship, Mr. Rich introduced in the district court an official Certificate of Acquisition of Spanish Nationality by Residence issued by the Spanish Civil Registry. (76a-79a). He also presented an affidavit of a lawyer of the Spanish "Consejo de Estado", or State Council, and a Spanish law expert, stating that by reason of his Spanish naturalization, Mr. Rich "enjoys the same legal status [under Spanish law] as any other Spaniard by birth," and that the Government of Spain would consider it discriminatory were Mr. Rich treated differently by a foreign authority than a native-born Spaniard. (80a-83a).

Mr. Rich was not a participant in the events on which plaintiffs' claims were based. He was sued on the basis that

the corporation which committed certain alleged wrongful acts was his "alter ego." Plaintiffs below are Action S.A. ("Action"), a French corporation, and Deltamar Establishment ("Deltamar"), a Liechtenstein corporation, engaged in the international trading of rice.

The Controversy

The amended complaint, upon which the default judgment was based (39a-48a), alleged that in May-June 1981, Action agreed to buy a quantity of Indian rice from a foreign corporation then known as Marc Rich & Co Grain AG (later renamed Richco Grain AG) ("Grain"), under a contract which provided for a maximum of 7% "broken" grains, but did not define the minimum length of a "broken" grain. It alleges that Action then resold the rice to Eurico Group ("Eurico"), an Italian commodities buyer, under a contract with identical specifications. Both sale and resale contracts provided that compliance with contract specifications would be satisfied by issuance of a "certificate of quality" by an agency called Societe Generale de Surveillance, S.A. ("SGS"). SGS issued a certificate of quality for the rice in question.

Plaintiffs alleged that (a) after the transporting vessel was loaded with the rice and had sailed, Action, learning that SGS had analyzed the rice by defining a "broken" grain to be less than 2/3 of a whole grain, asked Grain to confirm that this 2/3 grain basis conformed to an alleged "Indian standard"; (b) thereafter, a Grain employee (not Mr. Rich) sent a telex to Action stating that SGS had advised Grain that the 2/3 grain basis conformed to the claimed "Indian standard"; (c) this telex was false, in that SGS had not stated to Grain that Indian rice was graded on a 2/3 grain basis under the claimed "Indian standard"; (d) this representation was made to induce plaintiffs to pay for the rice; and (e) in reliance thereon, Deltamar paid Grain $4,876,300 and

accepted a letter of credit from Eurico conditioning Eurico's payment to Action on presentation of a SGS certificate attesting that the rice had been graded in accordance with the alleged "Indian standard". Plaintiffs alleged that Eurico refused to pay because the SGS certificate delivered did not attest to having graded the rice per the "Indian standard." They also alleged that upon inquiry, SGS stated that the "Indian standard" defined a "broken" grain of rice as less than 3/4 of a whole grain.

There was no allegation, evidence, or finding that Mr. Rich participated in, or even knew of, any of these alleged events.

The Proceedings Below

On January 17, 1983, almost five months after Mr. Rich's renunciation of U.S. nationality, plaintiffs commenced this action in the Southern District of New York against a corporation, Marc Rich & Co., Inc. ("MR Co"), which also had had no involvement in the underlying rice transaction. Their complaint alleged that MR Co was "the centerpiece" of a "corporate empire" run by Mr. Rich, a "citizen and resident of New York", and that MR Co operated through various corporations of convenience, including Grain. It alleged that these corporations were "agents, instrumentalities, and alter egos" of MR Co and "entirely under the domination and control " of MR Co and Marc Rich. The complaint asserted jurisdiction under 28 U.S.C. §1332, based on plaintiffs' alienage and MR Co's New York citizenship. It asserted claims of fraud, breach of an alleged brokerage contract, breach of a contract of sale, and unjust enrichment. It sought compensatory damages of $3,500,000 and exemplary damages of $3,500,000. Mr. Rich was not named as a party.

On August 29, 1983, more than a year after Mr. Rich's renunciation of U.S. nationality, plaintiffs joined Mr. Rich as a defendant by service of an amended complaint. The

amended complaint (39a-48a) differed from the original in alleging that "Marc Rich controls numerous businesses and companies, including defendant [MR Co], through which he conducts business for personal rather than corporate ends" (Amended Complaint ¶ 6; 40a), and that Mr. Rich, as well as MR Co, operated through "various tradenames and domestic and foreign corporations of convenience", including Grain. (*Id.*). It continued to assert jurisdiction solely under 28 U.S.C. §1332, claiming that Mr. Rich was a "citizen and resident of the State of New York". (Amended Complaint ¶ 2; 40a). The claims and prayer for damages remained the same as in the original complaint.

While Mr. Rich did not timely answer or move against the amended complaint, MR Co moved for dismissal of the complaint on a number of grounds, including lack of subject matter jurisdiction due to Mr. Rich's Spanish citizenship. This motion was denied by the district court in an order entered January 25, 1985, without prejudice to the right to "pursue this question [of subject matter jurisdiction] further by presenting testimony and documents at a hearing". (10a). Plaintiffs simultaneously moved for a default judgment against Mr. Rich. Mr. Rich then appeared through counsel to oppose the entry of a default judgment and to contend that the court lacked subject matter jurisdiction over the controversy because he, like the plaintiffs, was a citizen or subject of a foreign state. He submitted an affidavit (49a-51a) with the certified copies of his Spanish naturalization and renunciation of United States nationality referred to above, and a certificate of his Spanish citizenship issued by the Spanish Civil Registry.

Following submission of other affidavits and an evidentiary hearing on the jurisdictional question, the district court, on January 19, 1988, issued an opinion and order holding that it had subject matter jurisdiction, and granted the plaintiffs' motion for a default judgment against Mr.

Rich. It held that under §349(c) of the Immigration and Nationality Act, former 8 U.S.C. §1481(c) (1982), Mr. Rich bore the burden of establishing that he had intentionally renounced his U.S. citizenship in August 1982 and was not of diverse citizenship to the alien plaintiffs at the time of suit. (28a). Although the district court did not dispute that Mr. Rich became a citizen of Spain in 1982, that he swore a formal oath renouncing his U.S. citizenship, or that Spain thereafter regarded him as a citizen, it nonetheless held that Mr. Rich had not carried his supposed burden of proving his intent to renounce his U.S. citizenship. (28a-29a).

The district court's conclusion was based on three events (or non-events) occurring well after Mr. Rich's Spanish naturalization. The first was the timing of Mr. Rich's response to a March 25, 1983, letter from the United States Consul in Madrid. (52a-65a). This letter noted the published fact of Mr. Rich's Spanish naturalization, asked him to return an inquiry form, and stated that "[i]f no reply is received, the [State] Department may make an official determination of your U.S. citizenship status on the basis of all available information."* (52a). On November 23, 1984, Mr. Rich responded to the U.S. Consul, stating that he had renounced his U.S. citizenship "knowingly, with full advice of counsel, and with appreciation of the consequences of my act" and enclosed further sworn documents to that effect. (66a-71a). Notwithstanding this response, the district court concluded that the mere lapse of time between the March 1983 letter and the November 1984 response somehow

---

* The purpose of such consular letters, as explained at length in *Richards v. Secretary of State*, 752 F.2d 1413, 1416 (9th Cir. 1985), was to notify the individual who had undergone naturalization by a foreign government that "he had 30 days in which to present any evidence to support any contention that he did *not* intend to relinquish his United States citizenship when he became a [foreign] citizen." (Emphasis added). Thus, non-response or untimely response to such a letter could only be interpreted as acknowledgment by the ex-citizen that he *did* intend to give up U.S. citizenship as a result of undergoing foreign naturalization.

evidenced that Mr. Rich had not intended to renounce his U.S. citizenship in August 1982. (28a).

The second item relied on by the district court was a May 1983 pleading in a Swiss litigation drafted not by Mr. Rich but by his Swiss attorney, Dr. Bruno Becchio, in which that attorney asserted that Mr. Rich was an American citizen. (17a-20a). While the district court concluded that this was evidence that Mr. Rich had not intended to give up his U.S. citizenship in August 1982, it also recognized that Dr. Becchio's source of information for this allegation was unreliable: an 1974 entry of a Swiss corporation (of which Mr. Rich was a director) in the Commercial Register of Zug, Switzerland, which listed Mr. Rich as a U.S. citizen, and which was not updated with regard to Mr. Rich until 1985. The district court described "the evidence about the commercial register" as being "of no great weight in showing [Mr. Rich's] continuing intention to retain U.S. citizenship". (23a).*

Finally, the district court concluded, from testimony that Mr. Rich had been in the United States in late 1982 or early 1983 and an absence of a United States entry visa in a copy of Mr. Rich's Spanish passport, that he had used his former U.S. passport to enter the United States after August 1982. (20a-22a).

On April 24, 1991, after receiving affidavits from both parties addressed to the issue of damages, the district court dismissed plaintiffs' claims against MR Co and entered judgment against Mr. Rich for $1,696,460.26 in compensatory damages, $4,110,254.25 in prejudgment interest, and $500,000.00 in punitive damages. Mr. Rich filed his notice of appeal of the judgment on May 20, 1991.

---

* The court of appeals mischaracterized these facts as "Rich . . . list[ing] himself in the Commercial Register." (4a). The district court correctly characterized the entry as a corporate, not a personal, listing and found no evidence that Rich "would personally tend to the entries in the commercial register". (23a).

In its decision, 951 F.2d 504 (2d Cir. 1991), the Court of Appeals for the Second Circuit affirmed the district court's judgment, other than its calculation of prejudgment interest. The Second Circuit agreed with the district court that 8 U.S.C. §1481(c) and this Court's decision in *Terrazas* controlled the question of whether, for diversity purposes, Mr. Rich was a citizen of a foreign state, or of the United States, when sued (4a); held that under *Terrazas* Mr. Rich's Spanish naturalization and formal oath of renunciation of U.S. citizenship was insufficient to establish his specific intent to relinquish that citizenship (5a); and held that, even if Mr. Rich was a dual citizen of Spain and the United States when sued, only his United States citizenship should be given effect for diversity purposes. (5a-6a).

Reasons For Granting the Writ

I

THE SECOND CIRCUIT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW -- WHO IS A FOREIGN CITIZEN FOR DIVERSITY PURPOSES -- IN A WAY WHICH IGNORES TRADITIONAL DIVERSITY RULES, MISCONSTRUES FEDERAL LAW, AND MISAPPLIES A DECISION OF THIS COURT

A. The Accepted Test For Foreign Citizenship: Did Spain Regard Mr. Rich as Its Citizen?

Since *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), it has been axiomatic that under the congressional grant of diversity jurisdiction, federal courts may not exercise diversity jurisdiction in the absence of complete diversity among parties. *See Carden v. Arkoma Associates*, 494 U.S. 185, 187 (1990). Under the Constitution, Congress may not empower the federal courts to exercise diversity

jurisdiction over actions solely between aliens. *Hodgson v. Bowerbank*, 9 U.S. (3 Cranch) 303 (1809). Under the rule of complete diversity, federal courts do not have jurisdiction where the plaintiff and at least one defendant are citizens or subjects of a foreign state. *See, e.g., Faysound Ltd. v. United Coconut Chemicals, Inc.*, 878 F.2d 290, 294 (9th Cir. 1989); *Eze v. Yellow Cab Co.*, 782 F.2d 1064, 1065 (D.C. Cir. 1986); *Ed & Fred, Inc. v. Puritan Marine Insurance Underwriters Corp.*, 506 F.2d 757, 758 (5th Cir. 1975).* Until the decision below, the law was long settled that Mr. Rich, as a naturalized Spanish citizen, was a "citizen or subject of a foreign state" under 28 U.S.C. §1332(a), who could not be sued by alien plaintiffs in a diversity action.**

In *Murarka v. Backrack Bros.*, 215 F.2d 547 (2d Cir. 1954), then-Circuit Judge John Harlan stated the accepted rule: our courts regard an individual as a citizen of a foreign country for diversity purposes if that country regards him as its citizen. *Murarka* held that plaintiffs had proven their citizenship of "British India" (and thus the court's jurisdiction over their suit against a United States corporation) by producing an Indian consular certificate attesting to that citizenship. Judge Harlan wrote:

---

* This accords with the original intent of the constitutional grant of diversity jurisdiction in Article III, §2 of the Constitution: to avoid offense to foreign governments in state court lawsuits between an alien and a citizen of the state, where a local court passed "an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*," and which would "if unredressed, be an aggression upon his sovereign." *The Federalist* No. 80, at 446 (A. Hamilton) (I. Kramnick ed. 1987).

** "United States citizens have a right to become aliens," *Richards v. Secretary of State*, 752 F.2d 1413, 1422 (9th Cir. 1985), a right Congress recognized over a century ago. Preamble to the Act of July 27, 1868, ch. 249, 15 Stat. 223 ("[T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.").

> [T]he plaintiffs are entitled to the presumption of regularity which has long attached to the procedures of foreign governments and agencies. It is the undoubted right of each country to determine who are its nationals, and it seems to be general international usage that such a determination will usually be accepted by other nations.

Id. at 553. Thus, "our courts should...give presumptive credit to ... certificates of foreign governments [declaring who are their nationals]". *Id.* at 553. *Accord, Blair Holdings Corp. v. Rubinstein*, 133 F. Supp. 496, 499 (S.D.N.Y. 1955). *See also United States v. Wong Kim Ark*, 169 U.S. 649, 668 (1898) ("[I]t is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship."); *Medvedieff v. Cities Service Oil Co.*, 35 F. Supp. 999 (S.D.N.Y. 1940) (where plaintiff's Italian citizenship had been revoked by the Italian government, he was not a citizen or subject of a foreign state); 1 James W. Moore, et al., *Moore's Federal Practice* ¶0.75 [1.-3], pp. 800.49-50 (1991 ed.) ("[E]ach nation determines for itself who its citizens and subjects will be"); 13B Charles A. Wright, et al., *Federal Practice & Procedure*, §3604, p. 393 (1984).

. Deference to a foreign government's status determinations is thus a time-honored rule. *See United States v. King*, 44 U.S. (3 How.) 773, 784-86 (1845). It reflects important considerations of international comity and helps to avoid conflict between the United States and other nations over who are foreign nationals. In the district court, Mr. Rich presented a "certificate of [a] foreign government," Spain, declaring unambiguously that well prior to the time he was sued he was a national of Spain. That certificate should have established Mr. Rich's status as a foreign citizen for

diversity purposes and demonstrated the absence of the required complete diversity.*

B. 8 U.S.C. §1481(c) and *Terrazas* Do Not Require Proof of A Specific "Intent to Expatriate" in Diversity Cases

In jettisoning the time-honored rule for determining "who is a foreign citizen", the Second Circuit seriously misconstrued federal law and an important precedent of this Court. Citing the authority of former 8 U.S.C. §1481(c) and *Terrazas*, the court of appeals held that federal courts may hear diversity actions between citizens of foreign states if one of the parties was previously a U.S. citizen who had voluntarily naturalized himself in a foreign country and renounced U.S. citizenship, unless it is also shown that this party had an intent to relinquish U.S. citizenship. But, as the Court made clear in *Terrazas*, §1481(c) states an evidentiary rule which applies only in expatriation proceedings, not in challenges to diversity jurisdiction.

At the time Mr. Rich was joined, §1481(c) read in relevant part:

---

* The amended complaint alleged that the nominal corporate defendant, MR Co, was controlled by Mr. Rich and used by him to conduct business for personal ends, and thus his "alter ego", a "corporation of convenience" through which he allegedly transacted business. (40a). Where a corporate entity sued is alleged to be the "alter ego" of another individual or party who is not sued, the latter is an indispensable party under Fed. R. Civ. P. 19, and its citizenship must be taken into account in determining diversity. *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 559 (5th Cir. 1985); *see also Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 291 (5th Cir. 1989) (parent corporation assumes citizenship of alleged alter ego non-diverse subsidiary). Plaintiffs here, suing in diversity, amended their complaint to join Mr. Rich, a non-diverse defendant who was an indispensable party at the time the original complaint was filed. They thereby destroyed complete diversity and deprived the court of subject matter jurisdiction. *FreePort-McMoRan, Inc. v. K N Energy, Inc.*, 111 S.Ct. 858, 860 (1991). Dismissal of the complaint was thus required. Fed. R. Civ. P. 12(h)(3).

> Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence.*

While 28 U.S.C. §1332(a) is literally part of an "Act", the Second Circuit clearly erred in mechanistically applying 8 U.S.C. §1481(c) to a diversity dispute. The rule that courts must normally apply the literal language of legislation does not prevail in the "'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' In such cases, the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), *quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). This is one of those "rare cases" where the intention of the drafters rather than strict statutory language must control. When §1481(c) was added to the Code in 1961, Pub.L. No. 87-301, §19, 75 Stat. 656 (Sept. 26, 1961), its drafters made unmistakably clear that their sole intention was to prescribe the burden of proof assumed by the Government in expatriation proceedings, when it maintains that an individual has lost U.S. citizenship by performing one or more of the expatriating acts defined in 8 U.S.C. §1481(a).**

---

* This sentence was not changed when the section was amended and redesignated as 8 U.S.C. §1481(b) in 1986.

** Such proceedings include appellate hearings before the State Department Board of Appellate Review to review the issuance of a

(continued...)

§1481(c) originated in 1961 as §19 of S. 2237, 87th Cong., 1st Sess., which amended the Immigration and Nationality Act. The House Report to S. 2237, *H.R. Rep. No. 1986*, 87th Cong., 1st Sess. (1961) (the "*House Report*") (relevant portions reproduced at pages 36a-38a), viewed by this Court in *Terrazas* as the definitive statement of Congressional intent, 444 U.S. at 264, stated clearly that the section's evidentiary rules were to apply *only* in expatriation proceedings:

> Section 19 proposes to enact evidentiary rules governing adjudication of cases arising pursuant to chapter 3 of title III of the Immigration and Nationality Act, or comparable provisions of prior laws, where it is claimed that an act or conduct causing the loss of nationality was involuntary.
>
> It appears necessary to stress that the rules of evidence herein proposed are designed to govern proceedings affecting loss of citizenship (expatriation) and not revocation of naturalization (denaturalization) under section 340 of chapter 2 of the Immigration and Nationality Act, 8 U.S.C. 1451.

House Report at 40.

Terrazas recognized Congress' limited purpose in enacting this statute. The Court concluded from the legislative history that the "evident aim" of §1481(c) "was to supplant the evidentiary standards prescribed by *Nishikawa*

**(...continued)
Certificate of Loss of Nationality, *see* 22 C.F.R. §§7.3, 50.52 (1991), and an action brought by an individual for a declaration of his United States nationality under 8 U.S.C. §1503(a) (1988).

[*v. Dulles*, 356 U.S. 129 (1958)]." 444 U.S. at 264. *Nishikawa* had held that in expatriation proceedings the Government was required to provide proof of a voluntary expatriating act by clear and convincing evidence. 356 U.S. at 135. *Terrazas* noted that the *House Report* "took direct aim at *Nishikawa*'s holding," and that it cited with approval Justice Harlan's dissent in *Nishikawa*. *Id.* at 264 n.8. According to *Terrazas*, Congress enacted §1481(c) in order to substitute a preponderance standard for the more onerous burden of proof imposed in *Nishikawa*, and noted the *House Report*'s statement that §1481(c) "sets up rules of evidence under which the burden of proof to establish loss of citizenship by preponderance of the evidence would rest upon the Government." *House Report* at 41, *quoted at* 444 U.S. at 264 n. 8. *Terrazas* thus described §1481(c) as falling within the power of Congress to "prescribe the evidentiary standards to govern expatriation proceedings." 444 U.S. at 265.

Congress made abundantly clear that in enacting §1481(c), its intention was not to change the elements of proof in all proceedings where "loss of United States nationality" was an issue (else it would not have specified in the *House Report* that denaturalization proceedings, whose outcome is literally "loss of United States nationality", were not within §1481(c)'s scope), but only to specify the Government's burden of proof in *expatriation proceedings*.* The Second Circuit's application of a statute intended solely for expatriation proceedings to the foreign context of diversity jurisdiction was therefore "demonstrably at odds

---

* Indeed, if Congress had intended §1481(c) to affect determinations of U. S. citizenship where federal civil jurisdiction was in issue, and to change the long-accepted rule for determining who is a foreign citizen under 28 U.S.C. §1332(a), one would anticipate that it would use some clear language to that effect. *Feres v. United States*, 340 U.S. 135, 146 (1950). But no indication of any nature exists that the statute was intended to affect the determination of citizenship in diversity matters.

with the intention" of §1481(c)'s drafters. *United States v. Ron Pair Enterprises, Inc., supra*, 489 U.S. at 242.

The Second Circuit compounded this error by confusing this Court's constitutional interpretation of expatriation law in *Terrazas* with unrelated, non-constitutional issues of diversity jurisdiction. The possible outcome of an expatriation proceeding is loss of United States citizenship, a valuable right protected by the Fourteenth Amendment. *Terrazas* therefore held that in expatriation proceedings governed by §1481(c) the Government must not only prove that an individual committed an expatriating act defined by statute, but also that the individual specifically intended to give up United States citizenship by that act:

> The intent of the Fourteenth Amendment was to define citizenship;. . . that definition cannot coexist with a congressional power to specify acts that work a renunciation of citizenship even absent an intent to renounce. In the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct.
>
> * * * *
>
> *Afroyim* [*v. Rusk*, 387 U.S. 253 (1967)] requires that the record support a finding that the expatriating act was accompanied by an intent to terminate United States citizenship.

444 U.S. at 260, 263.

The Second Circuit recognized below that by obtaining foreign naturalization abroad, and swearing an oath of allegiance to the King of Spain, Mr. Rich committed expatriating acts as defined by Congress. (4a). *See* 8 U.S.C.

§1481(a)(1), (2). However, by requiring him to additionally prove a separate "intent to expatriate" to establish his status of foreign citizen, the Second Circuit impermissibly extended *Terrazas*'s constitutionally-imposed burden to non-constitutional questions of diversity jurisdiction. Nowhere in *Terrazas* did this Court suggest that the "intent to expatriate" requirement should be applied elsewhere than in expatriation proceedings.

Furthermore, while a showing of an "intent to expatriate" is constitutionally required where the outcome is loss of United States citizenship, it is irrelevant to the question framed below: whether a civil case must be tried in federal or state court. A successful challenge to federal diversity jurisdiction by one claiming to have relinquished United States citizenship does not result in loss of the claimant's citizenship. It results in an order dismissing the complaint for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). Such an order of dismissal is without prejudice; it is not *res judicata* as to the individual's citizenship, even in a later expatriation proceeding. Fed. R. Civ. P. 41(b). *See Costello v. United States*, 365 U.S. 265, 286 (1961). The Second Circuit's "constitutionalizing" of the question of who is a foreign citizen for diversity purposes is a fundamental error deserving of this Court's review and correction.*

---

* The decision below also ignores the limited nature of federal diversity jurisdiction. Such jurisdiction is presumed not to exist unless affirmatively shown; thus, if lack of complete diversity is alleged, the proponent of diversity must prove all elements of jurisdiction, including the adversary's diverse citizenship. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). But the decision below effectively reverses this presumption with respect to one who has formally renounced United States citizenship, has become a citizen of a foreign country, and challenges the existence of complete diversity. Unless the challenger carries the burden of showing that he had a separate "specific intent" to expatriate himself by his acts, diversity is presumed to exist.

C. The Consequences of the Decision Below

The Second Circuit's decision is not merely a serious misinterpretation of federal law and this Court's precedent. Unless reversed, that decision will lead to numerous undesirable results. To begin with, by making actions *between* aliens subject to federal jurisdiction, it will increase the federal diversity caseload. This flies in the face of the Chief Justice's numerous warnings that diversity jurisdiction places a tremendous additional burden on already overburdened federal courts and should be abolished or sharply curtailed. *See*, *e.g.*, Remarks of the Chief Justice, Proceedings of the Fifty-First Judicial Conference of the District of Columbia Circuit (May 22, 1990), reprinted at 134 F.R.D. 463.

> [T]heoretically, diversity jurisdiction is very, very difficult to justify. It's a subsidy that the federal taxpayer are paying for lawyers to have two different courts in which to plead. If we had an abundance of courts and the judges were looking around for things to do, the way they were 50 years ago, it would make a lot of sense. It just makes no sense now with the strain we have on judicial resources.

134 F.R.D. at 467. *See also Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 53-60 (1954) (Frankfurter, J., concurring) ("A legal device like that of diversity jurisdiction...offers constant temptation to new abuses").

Moreover, the type of cases which are most likely to be swept into federal courts by the Second Circuit's decision -- commercial and transactional disputes between aliens and ex-U.S. citizens -- are precisely those which can fairly and efficiently be tried in state courts or the courts of a foreign state. *See* Remarks of the Chief Justice Before the House of Delegates at the American Bar Association's Mid-Year

Meeting (February 4, 1992) 14 ("Before [any] added tasks are imposed on the federal courts...the question should be asked as to whether the state courts presently deal, and deal with reasonable effectiveness, with these same matters. If the answer is in the affirmative, it is probably better to follow the maxim, 'if it ain't broke, don't fix it.'").

Foreign governments will inevitably view as offensive a doctrine which treats their official determinations of citizenship as nullities, and discriminates between their native-born and naturalized citizens. They will also be offended by the stark lack of reciprocity inherent in the doctrine. Federal courts hold that once foreign-born citizens are naturalized under U.S. law, and take the statutory oath renouncing allegiance to foreign princes, potentates, states, and sovereigns (8 U.S.C. §1448 (1988)), they become citizens of the United States for diversity purposes, even if their countries of origin continue to consider them as nationals. *Sadat v. Mertes*, 615 F.2d 1176, 1187-88 (7th Cir. 1980); *Liakakos v. CIGNA Corp.*, 704 F. Supp. 583, 585 (E.D. Pa. 1988); *Nazareth Candy Co., Ltd. v. Sherwood Group, Inc.*, 683 F. Supp. 539, 542 (M.D.N.C. 1988). Yet, under the Second Circuit's decision, naturalization under foreign law, which includes a parallel renunciation of prior nationalities and allegiances to authorities other than the foreign country, will not receive reciprocal treatment: the individual will continue to be treated as an American citizen for diversity purposes.

By abandoning the traditional objective test of foreign citizenship for diversity purposes, the Second Circuit also replaces an easy-to-apply principle with an arbitrary and unworkable one. When is the ex-citizen's intent to relinquish U.S. citizenship to be judged: as of the time of his expatriating acts, at the time of the lawsuit (which may, as here, occur more than a year after the expatriating acts), or at an even later time? For example, can the ex-U.S. citizen who later decides that he wants to sue a citizen of a State in federal court "manufacture" diversity by declaring that

despite his earlier sworn oath, it was never his intention to give up U.S. citizenship? Can statements of intent to remain a U.S. citizen made by the expatriate *after* a lawsuit begins return him to the status of U.S. citizen? If so, does that change affect diversity? One can only imagine the incoherence of the body of law that is likely to evolve from such a flawed principle.

Finally, unless reversed by this Court, the Second Circuit's decision is likely to become unfortunate precedent in future rulings on expatriation law. Its holding will be seized upon by persons who have sworn an oath renouncing United States citizenship but later seek to reassert that citizenship; they will claim that under the decision their sworn declarations of renunciation should be disregarded in favor of later, self-serving statements of an "intent" to retain citizenship. If this decision is allowed to stand, it will ultimately increase the Government's burden of proving "intent to expatriate" in expatriation proceedings well beyond that which this Court found constitutionally required in *Terrazas*.

II

THE DECISION BELOW CONFLICTS WITH THE SEVENTH AND NINTH CIRCUITS' HOLDINGS THAT A SPECIFIC "INTENT TO EXPATRIATE" IS ESTABLISHED BY PROOF OF RENUNCIATION OF U.S. CITIZENSHIP AS PART OF A VOLUNTARY FOREIGN NATURALIZATION

Assuming, *arguendo*, that to establish his status as a citizen of a foreign state Mr. Rich was legally obligated to separately prove his intent to expatriate himself, the decision below conflicts with the better-reasoned views of the Seventh and Ninth Circuits in *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981) and *Richards v. Secretary of State*, 752 F.2d 1413 (9th

Cir. 1985). Those Circuits have held that proof of a formal oath of renunciation of U.S. citizenship, sworn in the context of a foreign naturalization proceeding, sufficiently establishes that an expatriating act was undertaken with the specific intent to relinquish that citizenship. The Court should grant certiorari to resolve the clear conflict between the circuits.

In *Terrazas*, this Court reviewed the Seventh Circuit's decision arising from an expatriation proceeding against an adult who, in the course of a Mexican naturalization proceeding, took an oath of allegiance to Mexico and swore a statement "expressly renounc[ing] United States citizenship." 444 U.S. at 255-56. The district court found that Terrazas acted voluntarily, and that his intent to expatriate had been proven by a preponderance of the evidence from the oath of renunciation and Mexican naturalization itself. *See* discussion of district court opinion, 444 U.S. at 256-57. On its initial review of this judgment, the Seventh Circuit found that "[a]ssuming that the proper [evidentiary] standards were applied, we are convinced that the record fully supports the court's findings," 577 F.2d 7, 10 (7th Cir. 1978), but invalidated §1481(c) on the grounds that under the Constitution the Government was required to prove loss of citizenship by clear and convincing evidence, rather than by the congressionally-prescribed preponderance standard. In *Terrazas*, this Court expressed no view as to whether the record before it established that Terrazas assented to expatriation, but reversed on the basis that the Seventh Circuit had improperly invalidated the preponderance standard prescribed by Congress. 444 U.S. at 264-70.

On remand *sub nom. Terrazas v. Muskie*, 494 F. Supp. 1017 (N.D. Ill. 1980), *aff'd sub nom. Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981), the district court and Seventh Circuit held (without the necessity of further factual findings) that the Government had proven Terrazas' intentional relinquishment of U.S. citizenship by showing that he

voluntarily swore a formal oath renouncing that citizenship when he became a Mexican national. *Id.* at 286. The Seventh Circuit held that the "knowing and understanding taking of an oath of allegiance to Mexico and an explicit renunciation of his United States citizenship is a sufficient finding that plaintiff intended to relinquish his citizenship." *Id.* at 288.*

The Ninth Circuit reached a similar conclusion in *Richards v. Secretary of State*, *supra*, where, in connection with his naturalization under Canadian law, the plaintiff had signed a "Declaration of Renunciation and Oath of Allegiance" stating in part "I hereby renounce all allegiance and fidelity to any foreign sovereign or state of whom or which I may at this time be a subject or citizen." 752 F.2d at 1416. The court held that Richards lost his United States citizenship by these acts, noting:

> [s]ome expatriating acts may be so inherently inconsistent with United States citizenship that persons performing them may be deemed to intend to relinquish their United States citizenship even in the absence of statements that they so intended the acts, or, indeed, even despite contemporaneous denials that they so intended the acts.

Id. at 1420 n.5.

It also held that:

---

* In *Terrazas*, this Court noted that the State Department had previously found Terrazas's declaration of allegiance to Mexico and concurrent repudiation of allegiance to the United States to be "compelling evidence of a specific intent to relinquish his United States citizenship". 444 U.S. at 263. Thus, the State Department, the district court, and the Seventh Circuit all found an oath of renunciation of U.S. citizenship, in the context of naturalization as a foreign citizen, sufficient to establish a specific intent to expatriate.

> the voluntary taking of a formal oath that includes an explicit renunciation of United States citizenship is ordinarily sufficient to establish a specific intent to renounce United States citizenship.

Id. at 1421.

The Second Circuit entirely disregarded this well-reasoned precedent in holding that Mr. Rich's sworn oath of renunciation, as part of his Spanish naturalization, was insufficient to prove his specific intent to renounce United States citizenship. Moreover, the court of appeals overlooked the very purpose of the oath of renunciation taken by Mr. Rich and many others in the course of foreign naturalization. Unquestionably, voluntary commission of many of the expatriating acts listed in 8 U.S.C. §1481(a) -- even swearing allegiance to a foreign state -- cannot be considered the equivalent of a statement that "I intend to give up my U.S. citizenship"; in such cases, additional proof of an intent to expatriate is necessary to meet the constitutional requirements outlined in *Terrazas*. But the distinction between deeds and intent vanishes when a voluntary naturalization is accompanied, as Mr. Rich's was, by an adult's explicit, sworn oath renouncing U.S. citizenship. Such an oath unambiguously expresses the intent required under *Terrazas*. No more is needed to establish "assent" to loss of citizenship. As another court said, in words cited in *Terrazas* (444 U.S. at 257), "[A]n oath expressly renouncing United States citizenship...would leave no room for ambiguity as to the intent of the applicant." *United States v. Matheson*, 400 F. Supp. 1241, 1245 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 809 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976).* The Court

---

* The importance of an oath of renunciation is underscored by the fact that where U.S. citizens have committed expatriating acts but have not

(continued...)

should grant certiorari to resolve this significant conflict between circuits and to clarify the standards for proving loss of citizenship.

III

THE SECOND CIRCUIT'S DECISION RESOLVES AN IMPORTANT QUESTION OF FEDERAL LAW -- WHETHER A "DUAL CITIZEN" IS ONLY A CITIZEN OF THE UNITED STATES FOR DIVERSITY JURISDICTION PURPOSES -- IN A WAY WHICH CONFLICTS WITH ESTABLISHED PRINCIPLES OF DIVERSITY JURISPRUDENCE

The Second Circuit's alternative holding raises an important question previously unaddressed by this Court. The court of appeals held that where a United States citizen becomes a "dual citizen" by reason of a voluntary foreign naturalization only his citizenship of a State matters for diversity purposes -- his foreign citizenship is to be ignored. (5a-6a).

This determination conflicts with every other area of the law where true dual citizenship exists. In all other areas, where a litigant has more than one citizenship, both citizenships are taken into account when determining diversity. If any adverse party is a citizen of either of the states of citizenship of the dual citizen, or is an alien if the dual citizen is, complete diversity, and hence jurisdiction, is lacking.

---

*(...continued)
forsworn U.S. citizenship, courts have refused to find that they had an intent to relinquish citizenship. *United States v. Matheson*, *supra*, *Parness v. Schultz*, 669 F. Supp. 7 (D.D.C. 1987) (plaintiff signed oath of allegiance to Israel but did not renounce his U.S. citizenship); *Kahane v. Schultz*, 653 F. Supp. 1486 (E.D.N.Y. 1987) (Rabbi Kahane, while taking a seat in the Israeli Knesset, had not yet signed an oath of renunciation and consistently maintained that he did not intend to relinquish U.S. citizenship).

Thus, a corporation is a citizen of every state or country in which it is incorporated. 28 U.S.C. §1332(c); *see Yoncoskie v. Delaware River Port Authority*, 528 F.2d 722, 727 n. 17 (3d Cir. 1975); *Smith v. Arundel Cooperative, Inc.*, 660 F. Supp. 912 (D.D.C. 1987); 1 *Moore, supra*, ¶ 0.78 [2.-1], pp. 800.142-43. A citizen of a State may not sue a corporation which is incorporated abroad and which has its principal place of business in the State. *See, e.g., Jerguson v. Blue Dot Investment, Inc.*, 659 F.2d 31, 35 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 446 (1982). Similarly, a limited partnership is a citizen of every state in which any of its partners reside. *Carden v. Arkoma Associates*, *supra*, 494 U.S. at 195. Thus, an alien may not sue a partnership where one or more partners are aliens. *See, e.g., Cunard Line Ltd. v. Abney*, 540 F. Supp. 657, 660 (S.D.N.Y. 1982). So too, an unincorporated association is a citizen of every state where its members are citizens, *Navarro Savings Ass'n. v. Lee*, 446 U.S. 458, 461 (1980), and an alien may not sue an unincorporated association with alien members. *See, e.g., Ex parte Edelstein*, 30 F.2d 636, 638 (2d Cir.), *cert. denied*, 279 U.S. 851 (1929).

Thus, under these well-established principles, one who is a "dual citizen" of a foreign country and a State should be considered to have the citizenship of *both* locations for jurisdictional purposes and to be non-diverse to any citizen of either location, including any alien. Such a standard will not only be consistent with existing law but have the desirable result of reducing the number of cases subject to diversity jurisdiction. The Court should grant certiorari to resolve this important issue.

Conclusion

A writ of certiorari should issue to review the judgment of the court of appeals.

Respectfully submitted,

ANDREW L. DEUTSCH
53 Wall Street
New York, New York 10005
(212) 858-5300

Counsel of Record and
Attorney for Petitioner
Marc Rich

Of Counsel:

MILGRIM THOMAJAN & LEE P.C.
CAROL M. FISCHER
ROBERT A. MEISTER

March 9, 1992

APPENDIX

APPENDIX A - OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 11, 1991

ACTION S.A. and Deltamar Establishment, Plaintiffs-Appellees,

v.

MARC RICH & CO., INC. and Marc Rich, Defendants,

Marc Rich, Defendant-Appellant.

No. 228, Docket 91-7528.

United States Court of Appeals, Second Circuit.

Argued Sept. 26, 1991.

Decided Dec. 11, 1991.

Daniel J. Beller, New York City (Paul, Weiss, Rifkind, Wharton & Garrison, Doreen Le Pichon, Gidon M. Caine, Jill M. Wheaton, of counsel), for plaintiffs-appellees.

Andrew L. Deutsch, New York City (Milgrim Thomajan & Lee P.C., Carol M. Fischer, Robert A. Meister, of counsel), for defendant-appellant.

Before LUMBARD, WINTER and ALTIMARI, Circuit Judges.

LUMBARD, Circuit Judge:

Marc Rich appeals from a default judgment in the District Court for the Southern District of New York, Griesa, *Judge*, for $6,306,714.51, consisting of $1,696,460.26 in compensatory damages, $4,110,254.25 in interest, and $500,000.00 in punitive damages. Rich presents three arguments in support of reversal: first, that the district court lacked subject matter jurisdiction; alternatively, that the default should be set aside to allow him to litigate on the merits; finally, that the damages must be recalculated. We find Rich's first two arguments to be without merit. We affirm the award of compensatory damages, and remand for recalculation of interest and punitive damages.

Procedural History

On January 17, 1983, Action S.A. and Deltamar Establishment, both foreign corporations, filed suit in the District Court for the Southern District of New York against Marc Rich & Co., Inc., a company operated by Marc Rich. On August 29, 1983, plaintiffs served an amended complaint on Rich, joining him in the action. The complaint alleged fraud, breach of fiduciary duty, breach of contract and unjust enrichment arising from a contract for the sale of rice. Federal jurisdiction was based on diversity of citizenship.

Rich failed to answer the complaint, and on January 22, 1985, plaintiffs moved for a default judgment against him. Rich made a limited appearance on January 28, 1985, claiming that the court lacked subject matter jurisdiction. Rich, who had been naturalized as a Spanish citizen in 1982, alleged that he had relinquished his United States citizenship, and thus complete diversity between the parties was lacking. On January 19, 1988, following an evidentiary hearing, Judge Griesa found that Rich had not relinquished his American citizenship in 1982 and that he was a United States citizen at the time this action commenced. The court granted plaintiffs' motion for entry of a default judgment, and denied Rich's subsequent motion to set aside that default. After an inquest on damages, held between January 1990 and January 1991, the court entered judgment for the plaintiffs on April 24, 1991, for $6,306,714.51.

I. SUBJECT MATTER JURISDICTION

A. Rich's Citizenship

In April 1982 a federal grand jury began investigating the activities of Rich and Marc Rich & Co., A.G. ("AG"). On August 16, 1982, Rich became naturalized as a Spanish citizen, appearing before a judge in Madrid and swearing an "oath and fidelity to the King and to obey Spanish Law which oath is given in the legal form and . . . renounc[ing] his USA citizenship." Rich thereby obtained Spanish citizenship, a Spanish national identity card, and a Spanish passport.

Despite his naturalization as a Spanish citizen, Rich continued to behave in a manner consistent with American citizenship. On March 25, 1983, the United States Consul in Madrid informed Rich that he might have lost his United States citizenship by swearing allegiance to Spain. The Consul requested that Rich respond within 30 days to clarify his intent. Rich did not respond until November 23, 1984, fifteen months after this action commenced.

In early 1983, when AG failed to comply with a subpoena to produce documents issued by the federal grand jury, Rich feared that, as an American citizen and chairman of the board of the company, he might be held in contempt for the company's actions. Consequently, in May 1983, Rich and his partner brought action in a Swiss court to compel production of the documents, arguing that "[t]he plaintiffs as private individuals with American citizenship are subject to American jurisdiction," and therefore risked sanctions for AG's failure to produce the documents.

Rich continued to use his American passport despite renunciation of American citizenship. Although he never produced the passport during discovery, a notable omission given the vast amount of evidence produced throughout this case, witnesses testified that they had seen him travelling in the United States during 1982 and 1983. His Spanish passport indicated no such travel during that time.

Rich also continued to list himself in the Commercial Register of the Swiss Canton of Zug as an American citizen living in Samosaguas, Madrid. Rich's stated citizenship in the register remained unchanged throughout 1982 and early 1983, despite a number of corrections made to other parts of Rich's entry during the years in question. Rich did not change his listing to indicate Spanish citizenship until May 13, 1985, after this action commenced.

B. Expatriation

At the time the complaint was filed in 1983, the relevant federal expatriation statute provided that:

> "A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts . . . (1) obtaining naturalization in a foreign state upon his own application . . . (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state . . . (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state . . ."

8 U.S.C. § 1481(a) (1982) (amended 1986). Under the statute, loss of American citizenship required a voluntary performance of an expatriating act. The Supreme Court, in *Vance v. Terrazas*, 444 U.S. 252, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980), added an additional element, namely a specific intent to relinquish United States citizenship. *See also Afroyim v. Rusk*, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757 (1967). Rich committed a voluntary act of expatriation by taking an oath of allegiance to Spain and renouncing his American citizenship. We must now determine whether the district court was correct in finding that Rich did not have the necessary intent to expatriate himself.

Rich contends that his acts of expatriation conclusively establish intent to relinquish United States citizenship. We disagree. Although the Supreme Court stated that any of the expatriating acts enumerated in the statute "'may be highly persuasive evidence . . . of a purpose to abandon

citizenship,'" *Terrazas*, 444 U.S. at 261, 100 S.Ct. at 546 (quoting *Nishikawa v. Dulles*, 356 U.S. 129, 139, 78 S.Ct. 612, 618, 2 L.Ed.2d 659 (1958) (Black, J., concurring)), the Court noted that "the trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship." *Terrazas*, 444 U.S. at 261, 100 S.Ct. at 546. *See Afroyim v. Rusk*, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757 (1967).

We have long required a distinct manifestation of intent in addition to the mere performance of an expatriating act. As we noted in *United States v. Matheson*, 532 F.2d 809, 814 (2d Cir.), *cert. denied*, 429 U.S. 823, 97 S.Ct. 75, 50 L.Ed.2d 85 (1976), "there must be proof of a specific intent to relinquish United States citizenship before an act of foreign naturalization or oath of loyalty to another sovereign can result in the expatriation of an American citizen." *See also Richards v. Secretary of State*, 752 F.2d 1413, 1420 (9th Cir. 1985) ("In the absence of such an intent [to relinquish citizenship, a United States citizen] does not lose his citizenship simply by performing an expatriating act, even if he knows that Congress has designated the act an expatriating act.")

The evidence strongly supports the district court's finding that Rich had no intention whatsoever to relinquish his American citizenship prior to commencement of this action. Despite mouthing words of renunciation before a Spanish official, he refused to acknowledge such renunciation before the United States Consul in Madrid before this action commenced. Instead, he brought a Swiss action as an American national, travelled on his American passport, and publicized himself in a commercial register as a United States citizen.

C. Dual Nationality

Rich argues that, in any event, he was a dual national of both America and Spain in 1982 and 1983, and as such was a foreign national for purposes of diversity. We disagree. In matters of diversity jurisdiction American citizenship will determine diversity. As the seventh circuit found in *Sadat v.*

Mertes, 615 F.2d 1176 (7th Cir. 1989), "only the American nationality of the dual citizen should be recognized under 28 U.S.C. § 1332(a)." We agree with the district court that it had subject matter jurisdiction.

II. VACATING THE DEFAULT

Rich contends that even if the district court had subject matter jurisdiction, the default should be set aside to allow him to litigate on the merits. A motion to set aside a default judgment is in the sound discretion of the judge, "'the person most familiar with the circumstances of the case and . . . in the best position to evaluate the good faith and credibility of the parties.'" *Marziliano v. Heckler*, 728 F.2d 151 at 156 (quoting *Davis v. Musler*, 713 F.2d 907, 912 (2d Cir. 1983)). The court must consider whether the default was willful, whether setting aside the default would prejudice the opposing party, and whether the moving party has shown that he may have a meritorious defense. *Marziliano v. Heckler*, 728 F.2d 151, 157 (2d Cir. 1984); *Davis v. Musler*, 713 F.2d 907 (2d Cir. 1983); *Meehan v. Snow*, 652 F.2d 274 (2d Cir. 1981).

A default should not be set aside when it is found to be willful. *See In re Men's Sportswear, Inc.*, 834 F.2d 1134, 1138-1189 (2d Cir. 1987); *Brock v. Unique Racquetball & Health Clubs, Inc.*, 786 F.2d 61 (2d Cir. 1986). Rich admits he deliberately chose not to appear in the action because he faced possible indictment upon return to New York.

Vacating the default and requiring the plaintiffs to litigate the merits of their case now -- eight years after they commenced this action and nine years after the events complained of -- surely would cause irreparable prejudice. Early in these proceedings Rich was granted a stay of discovery. The eight year delay, during which discovery was stayed, inevitably renders it difficult for plaintiffs to reconstruct and prove events which occurred almost a decade ago. *See Musler*, 713 F.2d at 916.

Rich has made no showing of a meritorious defense. Even if there were a trial on the merits, Rich admits he would not appear, either for discovery or for trial. He

concedes that his non-appearance during earlier proceedings "was a severe handicap to the presentation of his position," and that his anticipated failure to submit to discovery in New York will allow "an adverse inference, a preclusion of proof or of a defense, or a default" during trial. Rich's anticipated refusal to appear undercuts any reason to believe he may succeed on the merits.

III. DAMAGES

A. Compensatory Damages

Rich argues that the court erred by awarding compensatory damages of $1,696,460.26 without a full evidentiary hearing. Judge Griesa conducted a year-long inquest on damages involving volumes of affidavits and lengthy oral argument from the parties, and denied a subsequent defense request for a full evidentiary hearing. He concluded that a full hearing "would just be prolonging this further, which I'm sure your client wishes to do . . . ."

Rule 55(b)(2) of the Federal Rules of Civil Procedure provides that on the matter of damages "the court *may* conduct such hearings or order such references as it deems necessary and proper . . . ." (emphasis added). That rule allows but does not require the district judge to conduct a hearing. *See Fustok v. ContiCommodity Services, Inc.*, 873 F.2d 38, 40 (2d Cir. 1989) ("[I]t was not necessary for the District Court to hold a hearing, as long as it ensured that there was a basis for the damages specified in a default judgment."). Accordingly we have upheld an award of damages where "the District Court relied upon detailed affidavits and documentary evidence, supplemented by the District Judge's personal knowledge of the record, gained during four years of involvement with the litigation . . . ." *Fustok*, 873 F.2d at 40. *See also Pope v. United States*, 323 U.S. 1, 12, 65 S.Ct. 16, 22, 89 L.Ed. 3 (1944).

Judge Griesa was inundated with affidavits, evidence, and oral presentations by opposing counsel. In view of the long and tortuous history of these proceedings, he had "sufficient basis from which to evaluate the fairness of the

. . . sum." *Fustok*, 873 F.2d at 40. We see no reason to question his findings.

B. Interest

The district court awarded prejudgment interest compounded quarterly using the London Interbank Offered Rate (LIBOR), rather than New York's simple statutory rate of 9%. The court found that it had "discretion, based on certain factors, to award the augmented prejudgment interest." Rich claims this was in error, and we agree.

Under New York law, courts must apply the statutory rate of interest, except "in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion." N.Y.Civ.Prac.L. & R § 5001(a) (McKinney 1963). Because this is an action at law, the statutory rate of interest governs.

Plaintiffs suggest that their complaint is of an equitable nature, as it contains equitable claims for breach of duty and unjust enrichment. We have long held, however, that "the equity clause [of § 5001] should not become a source of sterile controversy over the classification of causes of action." *Spector v. Mermelstein*, 458 F.2d 474, 482 (2d Cir. 1973) (quoting 5 J. Weinstein, H. Korn & A. Miller, *New York Civil Practice* ¶ 5001.06, at 50-24 (1971). *See also Lewis v. S.L. & E., Inc.*, 831 F.2d 37, 39 (2d Cir. 1987) ("[E]ven on a claim with equitable underpinnings, such as one for breach of fiduciary duty, [the statutory rate of] prejudgment interest would be mandatory where the only relief sought was compensatory damages."); *United Bank Ltd. v. Cosmic Int'l Inc.*, 542 F.2d 868, 878 (2d Cir. 1976). The cause of action and damages requested were essentially legal in nature, and the court must apply the statutory rate of interest.

C. Punitive Damages

Rich argues that the district court erred in awarding plaintiffs punitive damages of $500,000.00 without a full evidentiary hearing. The court found that "[t]he allegations are of deliberate misconduct, including fraud, which caused very substantial damage over the long term to plaintiffs," and

that "the allegations . . . which have been, in effect, admitted by the default, present a picture of conduct which would cause judges and juries, as a matter of standard practice, to consider seriously the award of punitive damages."

Under New York law, punitive damages are appropriate in cases involving "gross, wanton, or willful fraud or other morally culpable conduct." *Borkowski v. Borkowski*, 39 N.Y.2d 982, 387 N.Y.S.2d 233, 355 N.E.2d 287 (1976) (mem). *See also Whitney v. Citibank, N.A.*, 782 F.2d 1106, 1118 (2d Cir. 1986). Such conduct need not be directed at the general public. *Ostano Commerzanstalt v. Telewide Systems, Inc.*, 880 F.2d 642 (2d Cir. 1989); *Roy Export Co. Establishment of Vaduz v. Columbia Broadcasting System, Inc.*, 672 F.2d 1095, 1106 (2d Cir.), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982) ("New York law clearly permits punitive damages where a wrong is aggravated by recklessness or willfulness, whether or not directed against the public generally." (citations omitted)).

Judge Griesa was in the best position to determine whether or not the award of punitive damages was an appropriate remedy. He found that they were, and we defer to that finding. *Whitney*, 782 F.2d at 1119. Rich had stated, through counsel, that he would not appear for an evidentiary hearing on punitive damages. Given this statement, and the voluminous amount of evidence on record, Judge Griesa was fully justified in awarding punitive damages without a full evidentiary hearing. Because the award of punitive damages took into account the court's award of augmented prejudgment interest, however, we remand for recalculation of punitive damages as well as for recalculation of interest.

We have considered appellant's remaining arguments and find them without merit.

The judgment is affirmed in part and reversed and remanded in part.

APPENDIX B - MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 18, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

ACTION S.A. and DELTAMAR ESTABLISHMENT,

Plaintiff,

-against-

MARC RICH & CO., INC.,

Defendant.

83 Civ. 0512 (TPG)

MEMORANDUM

- x

GRIESA, J.

Defendant Marc Rich & Co., Inc. has made several motions, which were disposed of by the court at the conference today as follows.

The court denies the motions to dismiss for failure to join an indispensable party, to dismiss the action on grounds of *forum non conveniens*, to stay the action pending the outcome of the litigation in Italy and Switzerland, and to stay the action so that the claims herein can be arbitrated.

The court also denies the motion to dismiss for lack of subject matter jurisdiction, without prejudice to the right of defendant Marc Rich & Co., Inc. to pursue this question further by presenting testimony and documents at a hearing.

So ordered.

Dated: New York, New York
January 18, 1985

/s/ Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

APPENDIX C - OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 19, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ACTION S.A. and DELTAMAR ESTABLISHMENT,	:	
Plaintiffs,	:	83 Civ. 0512
-against-	:	**OPINION**
MARC RICH & CO., INC. and MARC RICH,	:	
Defendants.	:	

GRIESA, J.

This lawsuit arises from a dispute about a shipment of rice from India to Italy, of which plaintiffs were the purchasers. The seller was Richco Grain A.G. ("Richco"), a Swiss corporation. Richco is not named as a defendant. Plaintiffs are asserting that Richco was merely the "alter ego" of Marc Rich individually ("Rich") and Marc Rich & Co., Inc. ("MR&C"). Rich and MR&C are the defendants in this action.

Plaintiffs seek to base federal jurisdiction on diversity of citizenship. Plaintiff Action S.A. is a French corporation. Plaintiff Deltamar is a Liechtenstein corporation. Defendant MR&C is a New York corporation. Plaintiffs contend that Rich was a citizen of New York at the time the action was commenced against him.

It is the latter point which raises the issue now before the court. Rich denies that he was a citizen of New York

when he was brought into the action and contends that he was a citizen of Spain, with the result that there is no diversity jurisdiction.

The motion before the court is one by plaintiffs against Rich for default judgment. Rich opposes the motion principally on the ground that there is a lack of subject matter jurisdiction.

Plaintiffs' motion for default judgment against Rich is granted. The court rules that Rich was a citizen of the United States at the time the action was commenced against him. It has been stipulated that if he was a citizen of the United States he was a citizen of New York. This means that there is the requisite diversity of citizenship for jurisdictional purposes. There is thus subject matter jurisdiction.

PROCEDURAL BACKGROUND

Plaintiffs commenced this action by filing a complaint solely against MR&C on January 17, 1983. In an amended complaint filed on August 2, 1983 plaintiffs added Rich as a defendant. Rich was served with the summons and amended complaint on August 29, 1983.

On September 19, 1983 Rich's time to answer the amended complaint expired. Rich did not answer.

On March 2, 1984 MR&C moved to dismiss or stay the action. One of the grounds for requesting dismissal was lack of subject matter jurisdiction.

While this motion was pending, on May 21, 1984 an entry of default as to Rich was placed on the record of the court pursuant to Fed. R. Civ. P. 55(a). On May 29, 1984 plaintiffs moved for a default judgment against Rich pursuant to Rule 55(b). This motion was held in abeyance pending the determination of MR&C's motion.

On January 18, 1985 the court denied the MR&C motion without prejudice to MR&C raising the issue of subject matter jurisdiction at a later time.

On January 22, 1985 plaintiffs again filed a motion for default judgment against Rich under Fed. R. Civ. P. 55(b). This is the motion now before the court. After the submission of affidavits and briefs, it appeared to the court that there should be a hearing, particularly to give Rich an opportunity to appear or to produce witnesses on his behalf. The hearing was held on May 27, 1987. Two witnesses testified. Rich himself did not appear. The hearing of May 27 closed the evidentiary record. Additional briefs were submitted thereafter.

FACTS

Rich was born in Antwerp, Belgium in 1934 and became a naturalized United States citizen in 1946. In 1982 the United States government began a criminal tax investigation into the affairs of Rich, his partner Pincus Green, and several companies related to them.

Proceedings Regarding Spanish Citizenship

During the summer of 1982 Rich took steps to acquire Spanish citizenship. On July 26 a resolution was issued by the Spanish Ministry of Justice Directorate General of Registries and Notaries granting Rich citizenship. However, under the terms of a letter sent to Rich on July 28 by the Directorate, the grant of citizenship had no legal effect until and unless Rich appeared within 180 days before a Notary Public to renounce his previous (U.S.) nationality and swear an oath of fidelity to the Spanish Head of State. The letter also stated that it was necessary that Rich be recorded as a Spanish citizen in the Civil Registry. The letter of July 28 stated:

> By resolution of 26 July 1982 this Directorate General . . . has granted Spanish nationality to Mr. Marc Rich . . . .
>
> . . . [B]e advised that said grant shall have no legal effect until the grantee appears before the competent official to renounce his previous nationality and to give an oath of fidelity to the Head of State and to obey the

Laws and, until he is recorded as Spanish in the Civil Registry; if, within 180 days of said notification these requisites are not performed, this grant shall be deemed to expire.

On August 16 Rich appeared before a District Judge in Madrid and signed the following documents stating that he renounced his U.S. nationality:

Certificate of the Acquisition of Spanish Nationality, Due to Residence

In Madrid, Congress of Civil Registry, . . . on the sixteenth day of August 1982 before the Official, Mr. Fernando de Chavarri y Revuelta, District Judge assisted by me,

APPEARS:

Mr. Marc Rich, USA nationality . . . with leave of this Honour STATES:

That he has received notice of a resolution issued by the Directorate General of Registries and Notaries (Ministry of Justice) dated 26th July last, according to which he has been granted Spanish nationality by residence and he appears in order to perform the requisite conditions.

Therefore, in the exercise of his powers and annexing the said resolution to his file, His Honour receives the Appearer who swears the oath of fidelity to the King and to obey Spanish law which oath is given in the legal form and the Appearer renounces his USA nationality.

In accordance with the requirement that Rich be recorded as a Spanish citizen in the Civil Registry, the District Judge, on August 16, forwarded to the Registry a copy of this statement.

Inquiry by the U.S. Consul in Madrid

On March 25, 1983 the United States consul in Madrid, Julian L. Bartley, sent Rich a letter which stated:

> It has come to our attention that on July 26, 1982 you were naturalized as a Spanish citizen. It is possible that by performing this act you may have lost your U.S. citizenship under Section 349(a)(1) of the Immigration and Naturalization Act . . . .
>
> It will be helpful in determining your present citizenship status if you would complete the enclosed "Information for Determining U.S. Citizenship" form. Please return the completed form within 30 days in the enclosed envelope. If no reply is received, the [State] Department may make an official determination of your U.S. citizenship status on the basis of all available information . . . .

Rich did not respond to this inquiry within the specified 30-day period. Rather, Rich waited until November 23, 1984, some 20 months after receipt of the inquiry, to respond. At that time, Rich sent a letter to Bartley stating:

> I respond to your March 25, 1983 letter concerning the status of my United States citizenship. As you appreciate, I have been fully occupied during these past months on other matters involving your Government. Now that these proceedings are at an end, I can turn to your inquiry.
>
> On July 26, 1982, I became a citizen of Spain, swearing my allegiance to that country and at the same time according to the laws of Spain I renounced my United States nationality and citizenship. I did so knowingly, with full advice of counsel, and with appreciation of the consequences of my act. I performed my act of expatriation, namely, being naturalized as a citizen of Spain, and taking an oath of allegiance to Spain voluntarily and with the intention of relinquishing my United States nationality and citizenship. Since renouncing my United States nationality and citizenship,

> I have claimed no benefit of United States nationality or citizenship. I am resolved that the decision I made and effected was necessary, correct and irrevocable.

Enclosed with this letter was a document entitled "Oath of Renunciation of the Nationality of the United States" and another document entitled "Statement of Understanding." These documents indicate that they had been executed by Rich on March 15, 1984, in Zug, Switzerland, before Rudolf Mosiman, a Swiss attorney. The Oath of Renunciation stated:

> I, Marc Rich, a former national of the United States, solemnly swear that I was born at Antwerp, Belgium on December 18, 1934,
>
> That I was a national of the United States by virtue of my naturalization on December 16, 1946, evidenced by Certificate of Citizenship No. A-166186 dated February 14, 1947,
>
> That I desire to confirm my formal renunciation of my American nationality, as provided in the Immigration and Nationality Act and pursuant thereto I hereby absolutely and entirely confirm my renunciation in June 1982 of my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

The Swiss Litigation

As part of the criminal tax investigation into the affairs of Rich, Pincus Green, and companies to which they were related, a grand jury in the federal court in New York issued a *subpoena duces tecum* in April 1982 for the production of documents by Marc Rich & Co., A.G. ("A.G."), a Swiss corporation. The board of directors of A.G. decided at a meeting on June 1, 1982 to refuse to comply with this subpoena. Judge Leonard B. Sand of the federal court, by an opinion dated August 25, 1982 and by orders dated September 2 and September 13, 1982, denied A.G.'s motion to quash the subpoena, ordered A.G. to produce the documents, and held A.G. in civil contempt for refusing to

comply. Under the terms of the September 13 order, the penalty for contempt was to be a fine of $50,000 per day until A.G. produced the documents, with the imposition of the fine stayed until the court of appeals ruled on an expedited appeal of the order. The court of appeals confirmed Judge Sand on May 4, 1983, and gave Rich until May 11 to comply with the subpoena before the fines would become operative.

Rich was chairman of the board of A.G. Pincus Green was a member of the board. Rich and Green instituted a legal proceeding in Switzerland on May 9, 1983 against A.G. seeking an order directing A.G. to comply with the subpoena in the U.S. criminal investigation. Paragraph 12 of the complaint in that action stated that Rich and Green were American citizens. The relevant text of paragraph 12 is as follows:

> The plaintiffs as private individuals with American citizenship are subject to American jurisdiction. In addition to the fine of U.S. $50,000. -- daily, extremely serious personal penalties can be pronounced under American law; in particular, individuals can be penalized in such cases for contempt of court.

This complaint was signed by a Swiss attorney, Dr. Bruno Bechio, representing Rich and Green.

An affidavit of Bechio dated March 13, 1985 has been submitted to the court in the present case, stating that, at the time Bechio drafted the complaint in the Swiss proceeding, Bechio's representation to the Swiss court about Rich being a U.S. citizen was made without Rich's knowledge, and that Rich did not review the representation. Further, Bechio states he was unaware that Rich had renounced his U.S. citizenship, and that the representation about citizenship was not based on any information conveyed to him by Rich, but that he relied on the Commercial Register in Zug, Switzerland for the information. As will be described, the Commercial Register listed the directors of A.G. and their nationalities. Rich was listed as a U.S. citizen until May 1985.

The record before the court in the present case also contains an affidavit of Rich dated February 6, 1985. This affidavit says nothing about the Swiss proceeding. It contains no statement corroborating the Bechio affidavit, or denying Rich's knowledge or authorization of the averment in the Swiss complaint that Rich was a U.S. citizen.

Plaintiffs in the present case raised serious questions about the credibility of the Bechio affidavit. One of the main reasons for holding the May 27, 1987 hearing was to allow Bechio to appear and to be examined and cross-examined about the circumstances surrounding the statement in the Swiss complaint that Rich was a U.S. citizen. As it turned out, Bechio did not appear, nor did any other witness appear to testify on this issue.

The court is convinced that the reason why neither Bechio nor any other knowledgeable witness appeared to testify for Rich regarding the Swiss litigation was that such testimony would have been entirely unfavorable to Rich. Moreover, the court finds that the Bechio affidavit is entitled to no weight. Aside from the inferences to be drawn from the failure of Rich to produce testimony, the circumstances strongly favor the conclusion that Rich knew full well that his attorney was making the averment that he was a United States citizen and that such averment was made because it favored his position in the Swiss litigation. The position of Rich and Green in the Swiss proceeding was that they were United States citizens, subject to United States laws, and that they would be subject to penalties if they could not comply with their duties under these laws.

Rich not only represented to the Swiss court (through his attorney) that he was an American citizen, but, as already described, he also delayed until November 23, 1984 informing the U.S. consul in Madrid of any renunciation of U.S. citizenship.

In this connection it is necessary to relate certain additional events in the Swiss proceeding. On May 10, 1983 the Cantonal Court in Zug, Switzerland issued a decree prohibiting A.G. from complying with the United States subpoena. The details of what occurred thereafter have not

been fully developed in the present case. However, plaintiffs have introduced an article from the Washington Post of November 22, 1984 stating that the Swiss government had announced the previous day that it was prepared to turn over documents of A.G. to the U.S. prosecutors. The article stated that the Swiss government had seized A.G.'s documents in September 1983 to prevent them from being turned over to the U.S. government under the subpoena. However, in November 1984 the Swiss government, according to the article, changed its position.

This newspaper article was introduced by plaintiffs to show that the matters discussed in the article were reported in the public press, from which, according to plaintiffs' argument, the court can infer that Rich had notice of the events involving the change of position by the Swiss government.

In his belated response to the U.S. consul of November 23, 1984 Rich explained that he had been "occupied . . . on other matters involving your Government." Rich added:

> Now that these proceedings are at an end, I can turn to your inquiry.

It is perfectly obvious that Rich intended to represent himself as a U.S. citizen to the Swiss court, and at the same time intended to defer making his renunciation of U.S. citizenship to the U.S. government - all with a view of continuing U.S. citizenship as long as it suited his various purposes. This posture of Rich continued until after the time Rich was brought into the present action in August 1983.

Rich's Use of U.S. Passport

Rich obtained a Spanish passport and national identity card on September 22, 1982.

At the hearing of May 27, 1987 plaintiffs sought to show that, subsequent to Rich obtaining Spanish citizenship and the Spanish passport, he used his U.S. passport in travelling to the United States. Plaintiffs called a witness by the name

of Peter Ryan, who was formerly employed by one of Rich's companies. Ryan was asked about whether he had seen Rich in New York in late 1982 and in 1983. Ryan claimed a lack of clear recollection, but did admit that he last saw Rich in the United States either in the fall of 1982 or at some point during the winter of 1982-1983.

Plaintiffs' attorney offered to call additional witnesses to prove that Rich was in the United States in 1983. At this point the court asked whether Rich's attorney would concede that this was the fact. Rich's attorney declined. The court then asked the attorney whether he had seen Rich in the United States in 1983. The attorney answered:

> I cannot swear - my guess is that I did, but I cannot swear that I did.

The attorney then undertook to check with another attorney at his firm and to check his firm's records, and stated that if he found any evidence that Rich was in the United States during the period in question, he would inform the court.

On June 2, 1987 Rich's attorney wrote the court as follows:

> I have made inquiry as the Court directed at the hearing on May 27, 1987. The result is that we do not deny that, after receiving Spanish citizenship in July/August 1982, Mr. Rich was, at some time or times, within the United States.

Of course, the letter did not really honor the attorney's promise to inform the court about the facts regarding Rich's presence in the United States. However, the letter is tantamount to an admission that Rich travelled to this country after the summer of 1982. Significantly, the letter contains no denial that those travels continued until and after the date Rich was joined in this lawsuit, August 29, 1983. The court concludes that the travels continued until after that date.

The important circumstance regarding these trips is that Rich did not use his Spanish passport. A copy of that

passport is in evidence, and shows no notation regarding Rich's trips to the United States during the period in question. Rich has not produced his U.S. passport, or a copy thereof. It appears clear that Rich retained his U.S. passport and that it was this passport which Rich used on his trips into the United Sates in 1982 and 1983.

Rich's retention of his U.S. passport and his continued use thereof is one more indication that Rich intended to continue his status as a U.S. citizen through and after August 1983 despite the steps he took to obtain Spanish citizenship in the summer of 1982. As the later discussion will show, United States law recognizes dual citizenship under certain circumstances.

The Swiss Commercial Register

Under Swiss law, a corporation must be registered in the Commercial Register in order to come into existence as a legal entity. Each Swiss canton maintains a separate register. Marc Rich & Co., A.G. was registered in the Commercial Register of the canton of Zug. Commencing in 1974 Rich was listed in the Zug Register as the chairman of the board of A.G. The listing stated that Rich was an "American citizen." This entry was not changed until May 1985, at which time it was amended to list Rich as a "Spanish citizen." During the period between the summer of 1982, when Rich claims to have renounced his U.S. citizenship, and May 1985, changes in the Register were made pertaining to A.G. For example, on August 4, 1983 an amendment was made noting that Alexander Haskel, a German citizen, had resigned as a director. Similarly, on August 16, 1983 an entry was made reflecting that Louis Cornu had resigned as an officer. However, no change was made regarding Rich's citizenship on these occasions or at any other time prior to May 1985.

At the hearing of May 27, 1987 Rich's attorney called a Swiss law professor to explain the legal significance of entries in the commercial register. This testimony was largely irrelevant. No witness testified on the factual question as to why the entry showing Rich as an American citizen was not

changed until 1985. Rich's affidavit says nothing on the subject.

Presumably, Rich would not personally tend to the entries in the commercial register. Consequently, the evidence about the commercial register is of no great weight in showing a continuing intention to retain U.S. citizenship. However, the evidence surely is not inconsistent with such an intention.

DISCUSSION

A federal district court has jurisdiction in all civil actions where the amount in controversy exceeds $10,000 and where the action is between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. § 1332(a). In order to be a citizen "of a State," an individual must be a citizen of both the United States, and of a particular state. *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir.), *rehearing denied*, 492 F.2d 1242, *cert. denied*, 419 U.S. 842 (1974). The existence of diversity is to be determined as of the time the action before the court was commenced. *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957).

Rich was a naturalized citizen of the United States for many years. The question before the court is whether he had terminated his United States citizenship as of the date he was brought into this action, August 29, 1983.

On this question it is necessary to turn first to be relevant statute, Section 349 of the Immigration and Naturalization Act, 8 U.S.C. § 1481. This is the statute referred to in the letter of March 25, 1983 sent to Rich by the U.S. consul in Madrid. The statute was originally enacted in 1952. It provides that a United States citizen shall lose his citizenship by what the statute terms as "act of expatriation." The statute lists a number of such acts, including serving in the armed forces of a foreign state without receiving prior written authorization from the Secretaries of State and Defense, accepting civilian employment by a foreign government under certain specified circumstances, and committing an act of treason against the United States. Other listed acts of expatriation are (the

following language comes from the version of the statute as it existed in 1982-84):

> (1) obtaining naturalization in a foreign state upon his own application . . .
>
> * * *
>
> (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or
>
> * * *
>
> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; . . .

8 U.S.C. §§ 1481(a)(1), (2) and (5) (1982) (amended 1986). Subsection (c) deals with the question of burden of proof, as follows:

> (c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b) of this section, any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

Under the first sentence of subsection (c), the party claiming loss of U.S. citizenship has the burden of proving such claim by a preponderance of the evidence. The last sentence of subsection (c) is not germane to the problem now before the

court. It deals with the question of whether an expatriating act was done "voluntarily." This refers basically to the question of whether there was duress. It does not deal with the broader question of intent to renounce U.S. citizenship. *Vance v. Terrazas*, 444 U.S. 252, 268 (1980). It is this question of intent which is the focus of the ensuing discussion.

The Supreme Court held in *Vance v. Terrazas* that a showing of one of the expatriating acts is not, in and of itself, conclusive on the question of whether there was been a termination of U.S. citizenship. The party seeking to show loss of citizenship must prove not only the commission of the act, but that the act was accompanied by an intent to terminate U.S. citizenship. *Id.* at 263. Certain of the specified acts may be highly persuasive evidence of a purpose to abandon citizenship, but the commission of the act does not conclusively settle the issue. *Id.* at 261.

Vance v. Terrazas had, of course, been decided prior to the events involved in the present case. It is of interest to note that in 1987 the introductory language of 8 U.S.C. § 1481(a) was amended to embody the ruling in *Terrazas*. Language was added to expressly provide that the acts of expatriation would result in loss of U.S. citizenship if done "with the intention of relinquishing United States nationality."

An oath of allegiance to a foreign government, even if coupled with a renunciation of U.S. citizenship given to the foreign government, does not conclusively establish the intent to terminate U.S. citizenship. This somewhat surprising proposition is established by the Supreme Court decision in *Terrazas*. It is appropriate to describe that decision and its background in some detail.

Terrazas was born in the United States, the son of a Mexican citizen. This made him a citizen of both the United States and Mexico. At the age of 22, while studying in Mexico, he executed a certificate of Mexican nationality, swearing adherence to the Mexican Republic and expressly renouncing U.S. citizenship. Thereafter, in administrative proceedings before the U.S. Department of State, Terrazas

contended that he had not lost his U.S. citizenship. The Department ruled that he had. Terrazas then brought an action under 8 U.S.C. § 1503(a) for a declaration of his U.S. nationality. The district court held that loss of U.S. citizenship had been proven by a preponderance of the evidence, in accordance with the statutory standard. The court of appeals reversed, holding that the Constitution required that proof of loss of citizenship must be by clear and convincing evidence, and that the statutory provision about burden of proof was invalid. The case was remanded to the district court. *Terrazas v. Vance*, 577 F.2d 7 (7th Cir. 1978). The Secretary of State appealed to the Supreme Court.

The Supreme Court opinion started by referring to the provision in 8 U.S.C. § 1481(a)(2) that a U.S. citizen shall lose his nationality by "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof." The Court stated that the issues for decision were whether, in order to establish loss of citizenship under § 1481(a)(2), there must be proof of "an intent to surrender United States citizenship," and whether the Constitution permits Congress to legislate with respect to the standard of proof as in § 1481(c). In its statement of facts, the Court noted that Terrazas had executed a document in Mexico expressly renouncing his U.S. citizenship. If this act of renunciation had been regarded by the Court as conclusive, then the Court would have needed to go no further. The Court obviously did not view the act of renunciation as conclusive, and went on to discuss at length the issue of whether proof of intent to terminate citizenship was required. Indeed, the Court made the issue of intent the focus of the case despite the fact that this issue had not been clearly delineated in either the district court ruling or the court of appeals opinion and despite the fact that the jurisdictional statement filed by the Secretary of State in the Supreme Court had not presented the question of intent as a specified issue. *Id.* at 258 n.5. After lengthy discussion, the Court held that in order to show loss of U.S. citizenship, there must be proof of the expatriating act and also proof that this act was accompanied by an intent to relinquish U.S. citizenship. *Id.*

at 263. The Court went on to uphold the statutory requirement of proof by a preponderance of the evidence, and to revise the ruling of the court of appeals to the contrary. The case was remanded for further proceedings.

The meaning of the Supreme Court opinion in *Terrazas* is that an act of expatriation - even the execution of a formal renunciation of U.S. citizenship - does not finally dispose of the issue of loss of citizenship, but that an issue of intent remains, on which all relevant evidence is to be considered.

On remand from the Supreme Court, the district court held that there was sufficient proof of Terrazas's intent to relinquish his U.S. citizenship, such proof consisting of the execution of the formal renunciation in Mexico in 1970, and his "course of conduct" during 1970-1971. *Terrazas v. Muskie*, 494 F. Supp. 1017, 1018 (N.D. Ill. 1980). The court of appeals affirmed, relying heavily upon his formal renunciation of 1970, but also referring to the surrounding circumstances, particularly the fact that Terrazas was seeking to avoid being drafted into military service in the United States. *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981). There was no further review by the Supreme Court.

Our law recognizes that under some circumstances a person may have dual citizenship in both the United States and a foreign country. *Sadat v. Mertes*, 615 F.2d 1176, 1185 (7th Cir. 1980); *Kahane v. Shultz*, 653 F. Supp. 1486 (E.D.N.Y. 1987).

Applying these rules of law to the present case, it is clear that Rich had the power in the summer of 1982 to become a Spanish citizen and to relinquish his citizenship in the United States. He could do this regardless of motive. *Kahane v. Shultz, supra* at 1494. On the other hand, despite the fact that Rich executed documents in Spain swearing allegiance to that country and purporting to renounce his U.S. citizenship, Rich would, as far as United States law was concerned, remain an American citizen as long as he intended to do so. This might make him a dual citizen of the United States and Spain, or conceivably this might cause problems with his status under Spanish law, but under the

law of United States he would remain a U.S. citizen as long as this was his intent.

Under 8 U.S.C. § 1481(c), Rich has the burden of proving by a preponderance of the evidence that he had terminated his American citizenship by the time in question - *i.e.*, the time when he was brought into the present action, August 29, 1983. He must show both the act of expatriation and the requisite intent.

Rich has certainly proved an act of expatriation. Unquestionably, he took an oath of allegiance to the Spanish nation in August 1982. The crucial question relates to his intent.

In this connection, Rich's signing of a Spanish form renouncing his U.S. citizenship must be weighed against the other circumstances described earlier in this opinion. Although Rich made the necessary statement and oaths required by the Spanish government, he deliberately delayed apprising the United States government regarding any termination of his American citizenship. In March 1983 Rich was specifically questioned about his status in a letter from the U.S. Consul in Madrid. It is of interest that one of the acts of expatriation listed in the statute is the making of a formal renunciation of nationality before a consular office of the United States in a foreign state, in accordance with procedures specified by the Secretary of State. 8 U.S.C. § 1481(a)(5). Rich refrained from attempting this act of expatriation until November 23, 1984. It is unclear whether Rich complied even then with the procedures specified by the Secretary of State. Of course, this court need not determine whether Rich effected a valid renunciation of his U.S. citizenship in 1984. The court concludes that Rich intended to maintain his citizenship status vis-a-vis the United States government at least until November 1984.

Rich's intent in this regard is also manifested by the fact that, through his duly authorized attorney, he represented himself as an American citizen in a complaint filed in a Swiss court in May 1983. Also, Rich travelled to the United States using his U.S. passport, and these travels lasted at least through 1983.

The court concludes that Rich has failed to prove by a preponderance of the evidence that he intended to terminate his U.S. citizenship at any time up to and including the date when he was made a party to this action. Indeed, the weight of the evidence affirmatively favors the conclusion that Rich did not intend to renounce his U.S. citizenship, but intended to maintain such citizenship at least through August 1983.

It has been stipulated that if Rich was a United States citizen at the time the action was commenced against him, he was a citizen of the State of New York. This means that there is the requisite diversity jurisdiction of citizenship and subject matter jurisdiction.

Rich raises one other objection to plaintiffs' request for default judgment. Rich contends that a default judgment should not be entered in a situation where there is a co-defendant who may be jointly liable, citing *Frow v. de la Vega*, 82 U.S. (15 Wall.) 552 (1872). However, the court of appeals for this circuit has indicated grave doubt about whether the rule in *Frow* still has any vitality in view of Fed. R. Civ. P. 54(b), which allows the entry of final judgment as to fewer than all the parties to an action. *International Controls Corp. v. Vesco*, 535 F.2d 742, 746 n.4 (2d Cir. 1976), *appeal after remand*, 556 F.2d 665 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

The problem in the present case is a practical one. Rich has refused to answer the complaint. Moreover, Rich has failed to raise the issue of subject matter jurisdiction by an appropriate motion under Fed. R. Civ. P. 12(b)(1). He thus left plaintiffs no alternative but to move for a default judgment.

As it happens, the case against the other defendant has not been tried. Now that the jurisdictional question has been decided, if Rich wishes to move to vacate the default judgment and to participate in a trial of the action with the other defendant, the court will entertain such a motion. If no such motion is made, and the default judgment stands, Rich will not be able to defend the action, and he should not be able to do so. As to the amount of damages, this will

need to be the subject of an inquest held at an appropriate time.

Plaintiffs' motion for default judgment against defendant Rich is granted. The court will confer with counsel regarding proceedings to implement this ruling.

SO ORDERED.

Dated: New York, New York
January 19, 1987

/s/ Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.

APPENDIX D - STATUTORY PROVISIONS

8 U.S.C. §1481(a) (1982):

(a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by --

(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: *Provided*, That nationality shall no be lost by any person under this section as a result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to this twenty-fifth birthday: *And provided further*, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this Act, apply for a visa and for admission to the United States as a non-quota immigrant under the provisions of Section 101(a)(27)(E), or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

(4) (A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment, an oath, affirmation, or declaration of allegiance is required; or

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(6) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(7) committing any act of treason against, or attempting to force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of Section 2383 of title 18, United States Code, or willfully performing any act in violation of section 2385 of title 18, or violating section 2384 of said title by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.

8 U.S.C. § 1481(c) (1982):

Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provision of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such a claim by a preponderance of the evidence. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of

this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

28 U.S.C. § 1332(a) (1988):

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between -

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

Federal Rule of Civil Procedure 12(b):

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief for which the adverse party is not required to serve a responsive pleading, the adverse party

may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rule of Civil Procedure 12(h):

(h) **Waiver or Preservation of Certain Defenses.**

* * *

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Federal Rule of Civil Procedure 19:

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) **Determination by Court Whenever Joinder not Feasible.** If a person described in subdivision (a)(1)-(2)

hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provision of Rule 23.

APPENDIX E - EXCERPT FROM THE HOUSE OF REPRESENTATIVES' REPORT TO S. 2237, H.R. REP. NO. 1986, 87TH CONGRESS, 1ST SESSION (1961)

87th Congress } HOUSE OF REPRESENTATIVES { Report
1st Session } {No. 1086

AMENDING THE IMMIGRATION AND NATIONALITY ACT AND FOR OTHER PURPOSES

August 30, 1961.-Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. WALTER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2237]

* * *

11. SECTION 19

Section 19 proposes to enact evidentiary rules governing adjudication of cases arising pursuant to chapter 3 of title III of the Immigration and Nationality Act, or comparable

provisions of prior laws, where it is claimed that an act or conduct causing the loss of nationality was involuntary.

It appears necessary to stress that the rules of evidence herein proposed are designed to govern proceedings affecting loss of citizenship (expatriation), and not revocation of naturalization (denaturalization) under section 340 of chapter 2 of the Immigration and Nationality Act (8 U.S.C. 1451). Consequently, this proposal does not affect the rules of evidence applicable to denaturalization cases laid down in 1943 in *Schneiderman v. United States* (320 U.S.C. 118) and left undisturbed by the law presently in effect.

The committee is willing to accept the rationale of a considerable body of judicial decisions that no conduct results in expatriation unless such conduct is engaged in voluntarily.

It is more difficult, however, to subscribe to *Gonzales v. Landon* (350 U.S.C. 920), and *Nishikawa v. Dulles* (356 U.S.C. 129) where the former equated *denaturalization* proceedings with *expatriation* and the latter stated that--

> *regardless of what conduct is alleged to result in expatriation, whenever the issue of voluntariness is put in issue, the Government must in each case prove voluntary conduct by a clear, convincing and unequivocal evidence.* [Emphasis supplied.]

The committee has noted that administrative application of *Nishikawa* had led to rulings vitiating outright not only the intent of the statute (sec. 349 of the Immigration and Nationality Act; 8 U.S.C. 1491), but doing violence to its very letter (Board of Immigration Appeals, Matter of J------- (A-10841893, decision No. 979) by ascribing involuntariness to absence from the United States for business purposes in order to avoid military service. The committee has noted similar misapplication of *Nishikawa* in the Board of Immigration Appeals' decision No. 1000 (Matter of G---- (A-11292737)), as well as in certain decisions of the Passport Office of the Department of State in cases adjudicated there pursuant to applications for the issuance or for renewal of passports.

The committee was impressed by the following statements contained in Justice Harlan's (whom Justice Clark joined) dissenting opinion in *Nishikawa*:

> Although the Court recognizes the general rule that consciously performed acts are presumed voluntary, see 3 Wigmore, Evidence (3d ed.), sec. 860; Fed. Rules Civ. Proc., it in fact alters this rule in all denaturalization cases by placing the burden of proving voluntariness on the Government, thus relieving citizen-claimants in such cases from the duty of proving that the presumably voluntary acts were actually involuntary.
>
> One of the prime reasons for imposing the burden of proof on the party claiming involuntariness is that the evidence normally lies in his possession.
>
> I * * * find myself compelled to dissent because in my opinion the majority's position can be squared neither with congressional intent nor with proper and well-established rules governing the burden of proof on the issue of duress.

In order to forestall further erosion of the statute designed to preserve and uphold the dignity and priceless value of U.S. citizenship, with attendant obligations, regardless of whether such citizenship was acquired at birth or by legal processes, section 19 of the amendment sets up rules of evidence under which the burden of proof to establish loss of citizenship by preponderance of the evidence would rest upon the Government. The presumption of voluntariness under the proposed rules of evidence, would be rebuttable -- similarly -- by preponderance of the evidence, thus leaving undisturbed the body of judicial decisions in which it is held that expatriation shall not occur if involuntariness, duress, or compulsion is established in rebuttal of the Government's contention that expatriation was voluntary.

In a report submitted in connection with a similar provision contained in H.R. 192, the Department of Justice raised the specter of unconstitutionality allegedly apparent in the event that the proposed amendment would have retroactive effect. The committee has amended the original version of this provision as it appeared in H.R. 192 so as to make it applicable only prospectively, in actions or proceedings commenced on or after the effective date of the proposed amendment.

APPENDIX F - AMENDED COMPLAINT DATED AUGUST 2, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ACTION S.A. and DELTAMAR ESTABLISHMENT,

Plaintiffs,

-against-

MARC RICH & CO., INC. and MARC RICH,

Defendants.

83 Civ. 0512 (TPG)

AMENDED COMPLAINT

Plaintiffs Action S.A. ("Action") and Deltamar Establishment ("Deltamar"), by their attorneys, Paul, Weiss, Rifkind, Wharton & Garrison, for their amended complaint, allege:

Nature of the Action

1. This is an action to recover compensatory and punitive damages for injuries resulting from defendants' fraud and other misconduct, and for such other relief as is proper.

Jurisdiction

2. Plaintiff Action is a corporation incorporated under the laws of France and is a citizen of France. Plaintiff Deltamar is a corporation incorporated under the laws of Liechtenstein and is a citizen of Liechtenstein. Defendant Marc Rich & Co., Inc. ("Marc Rich Co.") is a corporation incorporated under the laws of the State of New York with

its principal place of business in that State and is a citizen of New York. Defendant Marc Rich is a citizen and resident of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000. This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1332.

The Parties

3. At all relevant times, plaintiff Action was, and is, a corporation incorporated under the laws of France, with offices located at 82 Avenue Marceau, Paris, France 75008. Action is engaged in the business of buying and selling commodities, including rice.

4. At all relevant times, plaintiff Deltamar was, and is, a corporation incorporated under the laws of Liechtenstein, with offices located at Hauptstrasse 33, Vaduz, Liechtenstein. Deltamar is engaged in the business of buying and selling commodities, including rice.

5. At all relevant times, Marc Rich Co. was, and is, a corporation incorporated under the laws of the State of New York. Marc Rich Co.'s principal place of business is in the State of New York.

6. Marc Rich is a citizen and resident of the State of New York. Upon information and belief, Marc Rich controls numerous businesses and companies, including defendant Marc Rich Co., through which he conducts business for personal rather than corporate ends. The various tradenames and domestic and foreign corporations of convenience through which Marc Rich and Marc Rich Co. operate include, but are not limited to, "Richco N.Y.", "Marc Rich & Co. International Ltd.", "Marc Rich International Ltd. of New York", "Marc Rich & Co. Grain, A.G.", "RICHCO GRAIN A.G." and "Richco Grain Ltd." On information and belief, these entities are agents, instrumentalities and alter egos of Marc Rich and Marc Rich Co. These companies are directed from New York and are entirely under the domination and control and Marc Rich and Marc Rich Co.

7. Charles Pinto ("Pinto"), not named herein as a defendant, is employed by Marc Rich Co. At all relevant times, Pinto, in New York, engaged in business with plaintiffs

Action and Deltamar on behalf of Marc Rich and Marc Rich Co.

First Claim for Relief

8. In March 1981, defendants, under the name "Marc Rich & Co. Grain, A.G.," contracted with The Haryana State Cooperative Supply & Marketing Federation Limited ("Hafed"), a cooperative in India, to purchase approximately 30,000 metric tons of Indian IR-8 raw brown rice ("brown rice"), with the intent to resell the rice to one or more purchasers.

9. The terms of the aforementioned contract called for Hafed to furnish rice that met certain quality specifications, including a requirement relating to the percentage of "broken" kernels. Under a standard of measurement known as the Indian standard, a kernel of rice is "broken" if it is shorter than 3/4 of its regular length. In accordance with the custom and trade of the industry, it is universally understood and accepted that, in the absence of specific contractual terms to the contrary, quality specifications are determined according to the standard of the country of origin, in this case Indian standard.

10. Defendants believed, however, that if the brown rice to be delivered under the contract with Hafed were analyzed under the customary and usual Indian standard of 3/4, the percentage of "brokens" might be excessive, thereby making it more difficult to resell the rice. Accordingly, in order to reduce artificially the percentage of "brokens" and thereby increase the likelihood of reselling the rice, defendants (acting as "Marc Rich & Co. Grain, A.G."), devised the expedient of including in its contract with Hafed an unusual term providing that the rice should be analyzed for "brokens" on the basis of 2/3 (rather than 3/4) of an entire kernel. Under this standard a kernel of rice would be considered "broken" only if it were shorter than 2/3 of its regular length ("the lower standard").

11. On or about May 9, 1981, defendants, under the name "Marc Rich International Ltd. of New York," entered into a charter agreement with Caribbean Shipping Company, S.A., for the carriage of the brown rice, and insured shipments of the rice against all risks.

12. Shortly before June 1981, defendants, under the name "Richco Grain Ltd." and "Richco New York Grain" and acting through their agent Charles Pinto, in telecommunications from New York, requested Action to arrange for the sale of approximately 10-12,000 metric tons of the brown rice to an Italian commodities buyer known as the Eurico Group ("Eurico"). Pinto represented to Action that the rice conformed to certain quality specifications, including that the rice contained no more than 7% "brokens." However, defendants intentionally failed to disclose that the percentage of "brokens" had been determined on the basis of the lower standard (that is, 2/3 of an entire kernel) and not the Indian standard (that is, 3/4 of an entire kernel). Defendants also intentionally failed to disclose that Eurico was dissatisfied with the quality of an earlier shipment of brown rice, also from Hafed, which had been shipped by defendant to Eurico aboard the M/V Demetrius (the "Demetrius shipment"). Defendants intentionally and fraudulently failed to disclose these material facts to Action for the purpose of including Action to acquire the shipment of rice and to arrange for its sale to Eurico.

13. In reliance on the aforementioned representations, Action entered into an agreement with Eurico, whereby Action agreed to deliver to Eurico approximately 10-12,000 metric tons of Indian brown rice. Action further agreed that the rice would conform to certain specifications, one of which was that the rice would contain no more than 7% "brokens." Eurico agreed to pay for the rice by opening an irrevocable letter of credit.

14. It was a part of the agreement between defendants, under the name "Richco New York" and "Richco Grain A.G.", and Action, and also the agreement between Action and Eurico, that Societe Generale de Surveillance ("SGS"), an independent surveyor of various commodities (including rice), would analyze the shipment of brown rice when it was loaded aboard the shipping vessel. The purpose of this analysis was to determine whether the rice conformed to the various contractual specifications relating to the quality and weight of the rice. Pursuant to the aforementioned agreements, if SGS failed to issue an unqualified certificate concerning the quality and weight of the rice, the purchaser of the rice would not be obligated to pay. However, if SGS issued an unqualified certificate, the buyer could not refuse

to pay for the rice on the ground that the quality or weight was not according to contract.

15. Defendants, under all of its operating names, was fully aware of the provisions of the agreement between Action and Eurico.

16. In June 1981, defendants, under the name "Richco Grain A.G.," arranged for the shipment of brown rice to be loaded aboard the M/V Caribbean Dream ("Caribbean Dream") at Kandla, India. During the loading period, SGS took samples from and analyzed the shipment.

17. On or about June 23, 1981, SGS issued certificates of quality for the brown rice. These certificates were unqualified on their face and, among other things, stated that the percentage of "brokens" was 7%, in conformity with the contract terms regarding brokens between Action and defendants and between Action and Eurico. The SGS certificates, however, did not state on their face that the analysis was based on the lower standard.

18. Shortly after the Caribbean Dream set sail on or about June 24, 1981, negotiations between Action and Eurico took place about the letter of credit that Eurico was required to open pursuant to its agreement with Action. Eurico was reluctant to open the letter of credit because it was dissatisfied with the quality of the brown rice aboard the M/V Demetrius. In order to guard against similar problems with the new shipment of brown rice, Eurico demanded the right to re-analyze the Caribbean Dream shipment after it arrived in port.

19. Thereafter, Action advised Pinto of Eurico's position. For the first time, Pinto informed Action that the analysis of rice aboard the Caribbean Dream had been done in such a way that a kernel was measured as a "broken" only if it was shorter than 2/3 of the length of a whole kernel. When Action reminded Pinto that the rice was required to conform to the Indian standard, under which "brokens" were measured on the basis of 3/4, and not 2/3, of a whole kernel, Pinto stated that the Indian standard in fact referred to a measurement based on 2/3 of a kernel, and that Action truthfully could state to Eurico that the rice aboard the Caribbean Dream had been analyzed in accordance with the Indian standard.

20. Because the interpretation of the Indian standard was a material and significant element of the agreement

between Action and defendants and the agreement that Action had entered into with Eurico on defendants' behalf, Action requested that Pinto confirm in writing its representation that the Indian standard referred to an analysis based on 2/3, and not 3/4, of a kernel.

21. In response thereto, on July 2, 1981, defendants, under the name "Marc Rich & Co. Grain," sent the following telex to Action:

> "In reply to your question, our Mr. Ralph Saltiel, Director of Marc Rich + Co. Grain, officially states following:
>
> When in Kandla [India], Mr. Saltiel was officially told the following by Captain Bhudwaj of SGS:
>
> > '*Indian IR 8 Rice is always analyzed basis 2/3 grain as per official Indian standard unless otherwise requested and stipulated by their nominators.*'
>
> As no particular instructions were given by shippers or by Marc Rich both vessels M/V/ Demetrius and M/V Caribbean Dream were analysed on basis 2/3 grain as required by official Indian standards for IR 8 rice. Captain Bhudwaj, Director of Agri. Div., was officially sent down to Kandla by SGS in order to analyze all consignments and particularly Marc Rich consignments" (emphasis added).

22. The representations made by defendants as set forth in paragraphs 19 and 21 were false and constituted misrepresentations of material facts in that SGS had not stated that Indian rice was always analyzed on the basis of broken kernels being 2/3 of a whole kernel. Pinto and defendants' agent, Saltiel, knew such representations to be false and misleading at the time they were made in that Indian standard, as interpreted by SGS, refers to an analysis on the basis of 3/4 being a whole kernel. Said representations were made by Pinto and Saltiel for the purpose of inducing Action to cause Deltamar to pay for the brown rice.

23. On the basis of the oral and written representations of defendants, as set forth in paragraphs 19 and 21, plaintiffs

were induced to believe that the certificate issued by SGS covering the rice aboard the Caribbean Dream was based upon an analysis performed in accordance with the Indian standard. In reliance thereupon, Action caused Deltamar to pay Richco Grain A.G. $4,876,300 for the brown rice on or about July 14, 1981 and Action accepted a letter of credit from Eurico on or about July 28, 1981 which conditioned payment by Eurico upon presentment of an SGS certificate indicating that the rice had been analyzed in accordance with Indian standard.

24. On or about August 3, 1981, the Caribbean Dream arrived in Genoa, Italy. Eurico, however, refused to pay for the brown rice on the ground that the SGS certificate did not explicitly state that the rice had been analyzed according to the Indian standard, as required by the letter of credit. Immediately thereafter, Action, in reliance on the representations made to Action as alleged in paragraphs 19 and 21, requested SGS explicitly to certify that the brown rice had been analyzed according to the Indian standard. SGS, however, informed Action that the Indian standard referred to an analysis based on 3/4 of a whole kernel, and that the brown rice about the Caribbean Dream had been measured according to the lower standard of 2/3. Accordingly, SGS refused to certify that the rice had been analyzed according to the Indian standard.

25. As a result of the foregoing fraud, plaintiffs have been damaged in an amount to be determined at trial, but which is not less than $3,500,000.

Second Claim for Relief

26. Plaintiffs repeat and reallege paragraphs 1 through 25 hereof.

27. Plaintiffs acted as broker for defendants, (operating under all the names set forth in paragraph 6) in connection with the shipment of rice from India to Italy. As a consequence, defendants have the duty and obligation to reimburse plaintiffs for all losses and expenses incurred by plaintiffs while acting in an authorized manner as defendants' agent. By refusing to compensate plaintiffs for its losses and expenses incurred in connection with the shipment of rice from India to Italy, defendants have breached their duties and obligations to plaintiffs.

28. As a result, plaintiffs have been damaged in an amount to be determined at trial, but which is not less than $3,500,000.

Third Claim for Relief

29. Plaintiffs repeat and reallege paragraphs 1 through 25 hereof.

30. Defendants, under the name "Richco New York Grain", "Richco Grain Ltd.," "Marc Rich International Ltd. of New York" and "Richco Grain A.G.", had the contractual duty and obligation to provide plaintiffs with brown rice which was merchantable and conformed to the Indian standard. The rice in question was of such poor quality and condition as to be unmerchantable, and it did not conform to the Indian standard.

31. As a result of defendants' breach of its contractual obligations, plaintiffs have been damaged in an amount to be determined at trial, but which is not less than $3,500,000.

Fourth Claim for Relief

32. Plaintiffs repeat and reallege paragraphs 1 through 25 hereof.

33. Defendants, under a name not now known to plaintiff, insured the shipment of rice from India to Italy against all risks. On information and belief, defendants submitted a claim to their insurer for damages suffered as a result of the inferior and unmerchantable nature of the brown rice aboard the Caribbean Dream.

34. Although defendants received payment in full from Deltamar for the brown rice aboard the Caribbean Dream, defendants have refused to pay to plaintiffs the additional monies which, on information and belief, defendants' insurer has paid or promised to pay to defendants pursuant to defendants' insurance policy. Defendants have therefore been unjustly enriched at plaintiffs' expense.

35. As a result, plaintiffs have been damaged in an amount to be determined at trial, but which is not less than $3,500,000.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment against defendants as follows:

On the First Claim for Relief

1. Awarding judgment to plaintiffs against defendants in an amount to be determined at trial, but which is not less than $3,500,000.

2. Awarding judgment to plaintiffs against defendants in the amount of $3,500,000 as exemplary damages.

On the Second Claim for Relief

3. Awarding judgment to plaintiffs against defendants in an amount to be determined at trial, but which is not less than $3,500,000.

On the Third Claim for Relief

4. Awarding judgment to plaintiffs against defendants in an amount to be determined at trial, but which is not less than $3,500,000.

On the Fourth Claim for Relief

5. Awarding judgment to plaintiffs against defendants in an amount to be determined at trial, but which is not less than $3,500,000.

On All Claims for Relief

6. Awarding to plaintiffs and against defendants the costs and disbursements of this action, including reasonable attorneys' fees.

7. Awarding interest in such damages as are awarded at the highest rate and from the earliest date permitted by law.

8. Awarding to plaintiffs such other and further relief as is just and proper.

DEMAND FOR A JURY TRIAL

Plaintiffs hereby demand trial by jury against defendants.

Dated: New York, New York
August 2, 1983

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
A partnership including professional corporations

By /s/ Daniel J. Beller

345 Park Avenue
New York, New York 10154
(212) 644-8000

Attorneys for Plaintiffs

APPENDIX G - AFFIDAVIT OF MARC RICH DATED FEBRUARY 6, 1985 WITH EXHIBITS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ACTION S.A. and DELTAMAR ESTABLISHMENT,	
Plaintiffs,	: 83 Civ. 0512 (TPG)
-against-	
MARC RICH & CO., INC. and MARC RICH,	
Defendants.	

AFFIDAVIT OF MARC RICH

A F F I D A V I T

of Marc Rich

Marc Rich, being duly sworn, deposes and says:

1. I am a named as a defendant in action S.A. and Deltamar Establishment v. Marc Rich and Co., Inc., and Marc Rich, 83 Civ. 0512 (S.D.N.Y.) (TPG).

   I have personal knowledge of the facts stated herein.

2. My current business address is:

   Baarerstrasse, 37
   CH-6301 Zug / Switzerland.

My current home address is:

CH-6340 Baar / Switzerland.

3. I was born in Antwerp, Belgium, on December 18, 1934 and was naturalized as a citizen of the United States on February 14, 1947.

4. On July 26, 1982 I voluntarily relinquished my United States citizenship and became a citizen of Spain. I took an oath of allegiance to the Spanish Government before Angel Mendez Vives, Encargado de Registro Civil de Alcorcon (Madrid), Spain.

   At the time that I declared such oath and thereafter, I intended to renounce my United States citizenship.

5. On March 25, 1983 I was notified by the United States Dept. of State of a probable loss of my United States citizenship as a result of my oath of allegiance to Spain.

6. On March 15, 1984 I executed a Statement of Understanding and Oath of Renunciation of the Nationality of the United States before a Notary Public, confirming my renunciation of the United States citizenship in June, 1982.

7. True and correct copies of these papers are attached hereto as Exhibits "A" and "B".

8. On November 23, 1984 I wrote to Mr. Julien Bartley, Consul, Embassy of the United States, Madrid, Spain, enclosing the Statement of Understanding and the Oath of Renunciation of the Nationality of the United States. A true and correct copy of that letter is included in Exhibit "B" attached hereto.

Attachments: Exhibits "A" and "B"

Zug, February 6, 1985

/s/ Marc Rich
Marc Rich

Notarial Certificate
The signature of Mr. Marc Rich,
resident in CH-6340 Baar/Switzerland,
is herewith certified.

Zug, February 6, 1985 The Notary Public:
[seal of Rudolf Mosimann - Urkundperson Zug]

EXHIBIT A:

EMBASSY OF THE
UNITED STATES OF AMERICA

Madrid, Spain

March 25, 1983

Mr. Marc Rich
Paseo Castellana 141, Planta 19
Madrid-16

Dear Mr. Rich:

It has come to our attention that on July 26, 1982 you were naturalized as a Spanish citizen. It is possible that by performing this act you may have lost your U.S. citizenship under Section 349(a)(1) of the Immigration and Nationality Act. An excerpt containing this provision of law is enclosed.

It will be helpful in determining your present citizenship status if you would complete the enclosed "Information for Determining U.S. Citizenship" form. Please return the completed form within 30 days in the enclosed envelope. If no reply is received, the Department may make an official determination of your U.S. citizenship status on the basis of all available information.

You may want to discuss this matter with a consular officer before filling out this form. We will be pleased to arrange an appointment if you do wish to consult a member of our consular staff. This office is open from 9:00 a.m. to 12:30 p.m. It is closed on Saturdays, Sundays, American and Spanish holidays. Our office telephone number is 2-76-34-00, extension 330.

Your cooperation will be appreciated.

Sincerely yours,

/s/Julian L. Bartley
Julian L. Bartley
Consul

Enclosures:
As stated.

Note: Please submit the official Spanish document showing your acquisition of Spanish nationality, and your valid U.S. Passport No. Z2617833.

DEPARTMENT OF STATE
Passport Office
Washington, D.C.

IMMIGRATION AND NATIONALITY ACT

(Enacted June 27, 1952, 82d Congress, 2d Session; effective December 24, 1952.)

LOSS OF UNITED STATES NATIONALITY

Loss of Nationality by Native-born or Naturalized Citizen

Sec. 349. (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by--

(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: *Provided*, That nationality shall no be lost by any person under this section as a result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to this twenty-fifth birthday: *And provided further*, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this Act, apply for a visa and for admission to the United States as a non-quota immigrant under the provisions of Section 101(a)(27)(E), or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

(4) (A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment, an oath, affirmation, or declaration of allegiance is required; or

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(6) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(7) committing any act of treason against, or attempting to force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of Section 2383 of title 18, United States Code, or willfully performing any act in violation of section 2385 of title 18, or violating section 2384 of said title by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.

(b) Any person who commits or performs any act specified in sub-section (a) shall be conclusively presumed to

have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totalling ten years or more immediately prior to such act.

(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provision of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

Madrid, Spain
October 1981

INFORMATION FOR DETERMINING U.S. CITIZENSHIP

The following information is needed to determine your present citizenship status and your entitlement to consular services as a citizen of the United States. You may want to consult an attorney before completing this form. If you have any questions about the form, you should discuss them with a member of our consular staff before filling it out. Use extra paper if needed and attach any supporting documents to this form.

1. Name: _____
(Last) (First) (Middle)

2. Last U.S. Passport issued at _____ on _____
(Place) (Date)

3. Date and place of birth _____

4. If not born in U.S., citizenship acquired by:

☐ Naturalization on _____ before the _____
(Date) (Court)

☐ Birth outside the U.S. to U.S. citizen parent(s)

5. Give dates and countries of residence outside U.S. since birth.

Dates (From - To)	Country
_____	_____

_____ _____

_____ _____

_____ _____

If additional space is needed, use additional paper.

6. Answer this question only if at birth you became a citizen of the United States and of another country (for example, because you were born in the United States and thereby became a U.S. citizen, but one or both of your parents were citizens of another country and you also acquired that country's citizenship at birth). Have you sought or claimed the benefits of the nationality of a foreign state between December 24, 1952 and October 10, 1975? Examples of such benefits are possession or use of that country's passport, owning property in an area where noncitizens cannot own property, and obtaining employment for which noncitizens are ineligible. Circle one: Yes No

If you answered yes, please explain the benefits you sought or claimed.

_____

_____

_____

7. Have you performed any of the following acts? Please circle Yes or No

a. Been naturalized as a citizen of a foreign state; Yes No

b. Taken an oath or made an affirmation or other formal declaration of allegiance to a foreign state; Yes No

c. Served in the armed forces of a foreign state; Yes No

d. Accepted, served in, or performed the duties of any office, post or employment under the government of a foreign state; Yes No

e. Renounced U.S. nationality at a U.S. Consulate or Embassy; Yes No

8. If your answer to ALL of the questions asked in item 7 above is NO, please sign here:

Signature:_____ Date:_____

and return this form to the person who asked you to complete it. If you are completing this form at home, mail it in the enclosed envelope to the Consulate or Embassy.

9. You should be aware that under United States law a citizen who has performed any of the acts specified in item 7 with the intention of relinquishing United States citizenship may have thereby lost United States citizenship. If you voluntarily performed an act specified in item 7 with the intention of relinquishing United States citizenship, you may sign the statement below and return this form to us, and we will prepare the necessary forms to document your loss of U.S. citizenship. If you believe that expatriation has not occurred, either because the act you performed was not voluntary or because you did not intend to relinquish U.S. citizenship, you should skip to item 10, and complete the remainder of this form.

STATEMENT OF VOLUNTARY RELINQUISHMENT OF U.S. NATIONALITY

"I,_____ performed the act of expatriation indicated in
(Name)

Item 7 _____ voluntarily and with the intention of
(a,b,c,d, or e)

relinquishing my U.S. nationality."

Signature:_____ Date:_____

10a. Are you a national or citizen of any country

other than the United States; Yes No

b. If yes, of what country? _____

c. If yes, did you acquire that citizenship:

by birth in the foreign country? Yes No

by marriage? Yes No

by naturalization or registration on _____? Yes No
(Date)

Other (explain)?_____ Yes No

11a. When did you first became aware that you might be a United States citizen? (Give approximately date).

_____

_____

_____

b. How did you find out you were a United States citizen?

(For example did you always know you were a United

States citizen? If not when did you learn about your citizenship? Did someone tell you you were a citizen?)
_____
_____
_____

12a. Describe as specifically as you can the act or acts you performed as indicated in item 7 above. For example, by what means or in what sort of proceeding were you naturalized as a citizen of a foreign state? What was the nature of the oath you took? In what foreign army did you serve? What rank did you hold? What employment did you have and what were your responsibilities? Indicate precisely when and where the act was performed._____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

b. Describe in as much detail as possible the circumstances under which you performed the act or acts indicated in item 7 above. Did you perform the act or acts voluntarily? If not, in what sense was your performed of the act or acts

involuntarily? What was your intent in performing the act or acts?

13. Did you know that by performing the act described in item 7 above you might lose U.S. citizenship? Explain your answer.

14.(a) What ties did you have to the country where you performed the act indicated in item 7? (For example, do you maintain a residence, do you own property, do you have family or social ties, do you vote?)

(b) What ties do you retain with the United States? (For example, do you maintain a residence, do you have property, do you have family or social ties, do you vote, do you file U.S. income tax return, etc.)

_____
_____
_____
_____

Your answers on this form will become part of the official record in your case. Before signing this form, read over your answers to make certain that they are as complete and accurate as possible. If you would like to provide information that you believe relevant to a determination of your citizenship status but that is not called for by any of the questions on this form, you may attach separate sheets setting forth that information.

_____ _____

(Signature) (Date)

After signing, return this form to the American (Embassy, Consulate) at _____ in the enclosed envelope.

If you are completing it at the post return it to the person who asked you to complete it.

EXHIBIT B:

M A R C R I C H
BAARERSTRASSE 37
CH-6301 ZUG

23 November 1984

Mr. Julien L. Bartley
Consul
Embassy of the United States
of America
MADRID
Spain

Dear Mr. Bartley,

I respond to your March 25, 1983 letter concerning the status of my United States citizenship. As you appreciate, I have been fully occupied during these past months on other matters involving your Government. Now that these proceedings are at an end, I can turn to your inquiry.

On July 26, 1982, I became a citizen of Spain, swearing my allegiance to that country and at the same time according to the laws of Spain I renounced my United States nationality and citizenship. I did so knowingly, with full advice of counsel, and with appreciation of the consequences of my act. I performed my act of expatriation, namely, being naturalized as a citizen of Spain, and taking an oath of allegiance to Spain voluntarily and with the intention of relinquishing my United States nationality and citizenship. Since renouncing my United States nationality and citizenship, I have claimed no benefit of United States nationality or citizenship. I am resolved that the decision I made and effected was necessary, correct and irrevocable.

Very truly yours,
/s/Marc Rich
M. Rich

OATH OF RENUNCIATION OF THE NATIONALITY OF THE UNITED STATES

I, Marc Rich, a former national of the United States, solemnly swear that I was born at Antwerp, Belgium on December 18, 1934,

That I was a national of the United States by virtue of my naturalization on December 16, 1946, evidenced by Certificate of Citizenship No. A-166186 dated February 14, 1947,

That I desire to confirm my formal renunciation of my American nationality, as provided in the Immigration and Nationality Act and pursuant thereto I hereby absolutely and entirely confirm my renunciation in June 1982 of my United States nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining.

/s/Marc Rich
Marc Rich

Subscribed and sworn to before me this 15th day of March, 1984.

[seal of Rudolf Mosimann]

APOSTILLE

(Convention de la Haye du 5 octobre 1961)

1. Land: Schweizerische Eidgenossenschaft, Kanton Zug
   Country: Swiss Confederation, Canton of Zug
   Diese öffenlich Urkunde/This public document

2. ist unterschrieben von Mr. Rudolf Mosimann,
   has been signed by
   Zug

3. in seiner Eigenschaft als urkundperson d.hb Zug
   acting in the capacity of

4. Sie ist versehen mit dem Stempel/Siegel des (der) bears the stamp/seal of

   urkundperson

Bestäupt/Certified

5. in/to 6301 Zug/6301 Zug 6. am/the March 15, 1984
7. durch die Staatskanzlei des Kantons Zug
   by Chancery of State of the Canton of Zug
8. unter/under Nr. 4022

9. Stempel/Siegel/Stamp/seal 10. Unterschrift/Signature

/s/ Franz Fahegger
Franz Fahegger

STATEMENT OF UNDERSTANDING

I, Marc Rich, make the following statements of my understanding of the effect of my decision renouncing nationality of the United States:

I UNDERSTAND THAT:

1. I have the right to renounce my United States citizenship and I, having decided voluntarily, exercised the right in June 1982:

2. Upon renunciation I became an alien in relation to the United States of America;

3. My renunciation will not in and of itself affect in any way my eligibility to enter the United States as an alien;

4. Should I seek to re-enter the United States, I must then satisfy all of the requirements of the laws of the United States regarding the eligibility of aliens to enter the United States and that each case will be decided on its own merits and then only when a formal application is made;

5. If I do not meet the requirements for eligibility to enter as an alien, I may be permanently barred from entering the United States;

6. If I were not to possess the nationality of any country other than the United States upon the renunciation of my United States citizenship I will be a stateless person faced with the most extreme difficulties in travelling internationally and securing entry into most countries;

7. I have been afforded an opportunity to make a separate written explanation of my reasons for renouncing my United States citizenship and I do not choose to do so.

The extremely serious nature of my contemplated act of renunciation has been full explained to me and I fully

understand the consequences of the action I have taken. I affirm that I have read the contents of this Statement in the English language and fully understand its contents.

/s/Marc Rich
Marc Rich

Subscribed and sworn to before me this 15th day of March, 1984.

[seal of Rudolf Mosimann]

APPENDIX H - AFFIDAVIT OF RICHARD S. HOFFMAN DATED FEBRUARY 11, 1985 WITH EXHIBITS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ACTION S.A. and DELTAMAR ESTABLISHMENT,	:	
	:	83 Civ. 0512
Plaintiffs,	:	(TPG)
-against-	:	**ATTORNEY'S AFFIDAVIT**
MARC RICH & CO., INC. and MARC RICH,	:	
Defendants.	:	

District of Columbia) ss.:

RICHARD S. HOFFMAN, being duly sworn, deposes and says:

1. I am an attorney in the law firm of Williams & Connolly, representing defendant Marc Rich. I make this affidavit in support of Mr. Rich's opposition to plaintiff's application for a default judgment.

2. On February 11, 1985 I received a Certificate of Acquisition of Spanish Nationality of Marc Rich stating that on July 26, 1982, Mr. Rich swore an oath of allegiance to the government of Spain and renounced his United States citizenship. See Exh. A attached hereto. A translation of that document from Spanish to English, notarized by an official translator, is attached as part of Exh. A.

3. I also received at the same time a certificate of authenticity from Judge Jose Maria Ferrer de la Puente, attesting to the genuineness of the document bearing the signature of the Judge, the applicant and the secretary. The

certification and translation thereof is attached as part of Exh. A.

4. Spanish citizenship was granted to Mr. Rich on July 28, 1982 as a result of his oath of allegiance and renunciation of United States citizenship. A certified copy of the entry from the Ministry of Justice, Directorate General of Regestries and Notaries, together with an official translation, is attached hereto as Exh. B.

5. On February 11, 1985, I caused a copy of defendant's Opposition to Application for Default Judgment and accompanying papers to be hand delivered to:

Daniel J. Beller, Esq.
Elizabeth McNamara, Esq.
Paul, Weiss, Rifkind, Wharton
& Garrison
345 Park Avenue
New York, New York 10154

Robert J. Thomajan, Esq.
Milgrim, Thomajan, Jacobs & Lee
405 Lexington Avenue
18th Floor
New York, New York 10174

/s/ Richard S. Hoffman
Richard S. Hoffman

Subscribed and sworn to before me
this 11th day of February, 1985.

/s/ Moira K. Ricketts
Notary Public

My Commission Expires February 14, 1988

EXHIBIT A (TRANSLATION):

MINISTRY OF JUSTICE

DIRECTORATE GENERAL

OF REGISTRIES AND

NOTARIES

Madrid, 28 July 1982
Reference: 551 R-2500-82

To the Judge in Charge of the

Civil Registry of Madrid,

District Court No. 5,

Paseo del Prado,30

By resolution of 26 July 1982 this Directorate General by delegation of the Minister of Justice (Ministerial Order 15 October 1980) has granted Spanish nationality to Mr. Marc Rich resident in Madrid, Reyes Magos Street, No. 8.

I hereby return the file for your custody and, I notify you of the foregoing to enable you to formally notify the grant hereof to the interested party who shall, apart from that which is referred to on the back hereof, be advised that said grant shall have no legal effect until the grantee appears before the competent official to renounce his previous nationality and to give oath of fidelity to the Head of State and to obey the Laws and, until he is recorded as Spanish in the Civil Registry; if, within 180 days of said notification these requisites are not performed, this grant shall be deemed to expire.

The Registry official who issues a certificate shall, if necessary, inform the pertinent Classification and Review Board of the name and surname, date of birth and nationality (date of the oath) and address to the interested party or of his children, as referred to in the tenth warning on the back hereof.

May God care for you for many years.

Signed: Head of Section

This photocopy has been compared with the original document.

Signed: The official: Andrés Luis Quesada Martos.

EXHIBIT B (TRANSLATION):
The Congress Civil Registry
Paseo del Prado, 30
M A D R I D 28014

Certificate of the acquisition of Spanish nationality, due to residence.

In Madrid, Congress Civil Registry, at 13:00 hours on the sixteenth day of August One thousand Nine hundred and Eight two before the Official, Mr. Fernando de Chavarri y Revuelta, District Judge assisted by me,

A P P E A R S :

Mr. Marc Rich, USA nationality, of legal age, married, businessman, residing in this capital, Guadiana Street, number 12, 2nd floor, Residence permit number 601.112, valid and in force and with leave of his Honour STATES:

That he has received notice of a resolution issued by the Directorate General of Registries and Notaries (Ministry of Justice) dated 26th July last, according to which he has been granted Spanish nationality by residence and he appears in order to perform the requisite conditions.

Therefore, in the exercise of his powers and annexing the said resolution to the file, His Honour receives the Appearer who swears the oath of fidelity to the King and to obey Spanish Law which oath is given in the legal form and the Appearer renounces his USA nationality.

For registration purposes His Honour resolves to annex the birth certificate and to remit the same with one copy hereof to the Official of the Central Civil Registry.

These presents are issued in duplicate and are read, approved and signed by His Honour, of which I bear witness.

Bevore me

Signed: signature illegible Signed: Signature illegible

Signed: signature illegible

This photocopy is an exact reproduction of the original which is annexed to file number 333/82 dealt with by this office and which concerns the acquisition of Spanish nationality, due to residence, at the instance of Mr. Marc Rich, and the certificate of which bears the signature of the Judge, the Applicant and the Secretary.

And so the same may be known I issue this Certificate which I sign in Madrid on the Seventh day of January One thousand Nine hundred and Eight five.

Signed: signature illegible
Maria Pilar Ciria Matilla
Secretary to District Court
no. 15

I, José Maria Ferrer de la Puente, Judge
charged with the Congress Civil Registry of Madrid,
H E R E B Y C E R T I F Y :
That the foregoing signature is of Maria Pilar Ciria Matilla, Secretary to District Court no. 15 of Madrid and of the congress Civil Registry.

Madrid, on the Seventh day of February One thousand Nine Hundred and Eighty five.

Signature illegible

APOSTILLE

The Hague Convention of 5th October, 1961.

1. Country: Spain

This document:

2. Has been signed by Ms. Maria Pilar Ciria Matilla
3. Acting in her capacity as Secretary to District Court no. 15 and to the Congress Civil Registry.

CERTIFIED:

5. In: Madrid 6. On: 8th February, 1985
7. By: Mr. Manuel Telo Alvarez, Secretary to the Board of Administration of the Territorial Chamber.
8. Under number 64
9. Seal/Stamp (A rubber stamp is affixed which states: "Madrid Territorial Chamber Board of Administration Secretariat") (A 90 peseta stamp is also affixed no. 442753)
10. Signature: Signed: illegible

A rubber stamp is affixed which states:-

"Corresponds to legalization
number 119 of 1985.
Court tax 70 pesetas
Secretary to the Board of Administration"

Signed: signature illegible

A rubber stamp is affixed which states:-

"Madrid Territorial Chamber
Board of Administration Secretariat".

In my capacity as Translator to the English language, according to my appointment dated 1st July, 1974, by the Ministry of Foreign Affairs, I HEREBY CERTIFY that this document is a true and

accurate translation of the original document in the Spanish language according to the best of my knowledge.

Madrid, 8th February, 1985.

Signed: /s/ Juan del Carré

Juan del Carré

APPENDIX I - CERTIFIED TRANSLATION OF THE AFFIDAVIT OF JAVIER GOMEZ-ACEBO SAENZ DE HEREDIA DATED MAY 25, 1987

CONSEJO DE ESTADO

—

JAVIER GOMEZ-ACEBO SAENZ DE HEREDIA
Lawyer of the State Council

TRANSLATION

I HEREBY DECLARE THAT:

FIRST.- The Lawyer, Mr. Jesús A. Madalena, Partner of the ARME LAW OFFICE, Velázquez, 21, Madrid, provided me with originals and authenticated photocopies of the following documents to enable me to prepare a legal report:

1.- A resolution of the Ministry of Justice, Directorate General Registries and Notaries, dated in Madrid, 28 July 1982.

2.- An Act recording the acquisition, by residence, of Spanish nationality, dated 16th August, 1982.

3.- Letter from the Justice Administration to the Official of Civil Registry, dated 16th August 1.982.

4.- Certificate of an extract of an entry of birth, issued on 3rd September, 1982.

5.- Advertisement published in the Official State Gazette, dated 11th February, 1983.

6.- Photocopy of a passport issued on 22nd September 1982.

7.- Photocopy of a National Identity Document, issued on the same day.

The foregoing all refers to the acquisition of Spanish nationality by the former United States citizen, Mr. Marc Rich Wang.

SECOND.- As a Lawyer of State Council, I am qualified to interpret the Laws and Official Documents, and to issue a legal opinion regarding the extent and content thereof and, in regard to that which has been requested by the said lawyer, Mr. Madalena and, in view of the aforementioned documents, I am able to affirm and I do hereby affirm, that Mr. Marc Rich acquired Spanish nationality according to Spanish Law and Regulations and, that he gave up his previous nationality as a USA Citizen, as required by article 19 of the Spanish Civil Code which, briefly, provides as follows:

1.- Prior renouncement of existing nationality.

2.- To promise, under oath, to the faithful to the Head of State and to obey the Laws.

3.- To be entered as a Spanish subject in the Civil Status Registry.

All the foregoing requirements were performed by Mr. Marc Rich in his acquisition of Spanish nationality, as is shown by the beforementioned documents.

Therefore and, in accordance with the Constitution and Spanish Law, Mr. Marc Rich abandoned, by renouncement, his prior status as a national of the United States of America and, he simultaneously acquired Spanish nationality with all those rights and duties inherent thereto.

Amongst those duties beforementioned, there is a duty to perform military service provided the person who acquires Spanish nationality is of an age of between 18 and 37 years of age, which clearly does not affect Mr. Marc Rich. Amongst such rights, the following are notable:

a.- The right to obtain a Spanish passport and National Identity Document. Both such documents were given to Mr. Marc Rich on 22nd September 1982.

b.- To enjoy the same rights as those granted by Law to Spanish subjects to birth. That is, Mr. Marc Rich enjoys the same legal status as any other Spaniard by birth.

Therefore, and in conclusion, Mr. Marc Rich Wang, is entitled to be recognized as a Spanish national by all Governments or Authorities, whether Spanish or foreign.

The fact that his Spanish nationality was acquired by nationalization and not by birth should not permit any judicial or administrative authority, whether Spanish or foreign, to discriminate against him by giving him a legal status different to that given to Spanish nationals by birth.

It is by conclusion, that if such discrimination was made, in view of the foregoing, the Government of Spain would consider such treatment to be discriminatory, due to the failure to grant Mr. Marc Rich Wang his full rights of a Spanish subject.

Madrid, on 25th May, 1987.

Signed: Javier Gomez-Acebo Saenz de Heredia

CERTIFICATION.- I, Juan Bolás Alfonso, Notary of the Illustrious College of this Capital City, and, having my residence therein.

HEREBY CERTIFY: That I consider the signature of Mr. Francisco Javier Gomez-Acebo Sainz de Heredia, of loga age, Spanish nationality, resident in Madrid, to be his legitimate signature and, he holds a National Identity Document, number 1,475,306, which signature appears in the left hand margin of each of the first two pages and, at the end of the last page, of this deed which is composed of three pages of common paper, written on one side only thereof, as said signature is identical to that of said gentleman which appears on the said National Identity Document, which I have examined and returned.

Madrid, on the Twenty sixth day of May One thousand Nine hundred and Eighty seven.

Two stamps are affixed hereon, of Twenty five and five pesetas respectively.

An Apostille is affixed hereon, which states as follows:

Apostille
Hague Convention, 5th October, 1961

Royal Decree 2433/1973 of 2nd October.

1.- Country: Spain.
This public document
2.- Has been signed by Mr. Juan Bolás Aflonso.
3.- Acting in his capacity as Notary.
4.- It is sealed/stamped with the Notary's seal
CERTIFIED
5.- In Madrid. 6. On 27th May, 1987.
7.- By the Dean of the Madrid Notarial College
8.- With number 25.790.
9.- Seal 10. Signature

Two 25 peseta stamps are affixed Signed: Illegible
Roberto Blanquer Uberos

An ink stamp is affixed stating:
Illustrious Notarial College of Madrid.
I, Juan del Carro Tamás, HEREBY CERTIFY, that the aforementioned is a faithful translation of the original document, according to the best of my knowledge.

Madrid, 1st June 1987.

Juan del Carre Tamás

Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

No. 91-1435

In the
Supreme Court of the United States
October Term, 1991

MARC RICH,

Petitioner,

—v.—

ACTION S.A. and DELTAMAR ESTABLISHMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

DANIEL J. BELLER
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Counsel of Record for Respondents

Of Counsel:

Gidon M. Caine
Jill M. Wheaton
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should the Court review the question whether a United States citizen who takes an oath of renunciation while swearing allegiance to a foreign nation has, by virtue of these acts alone, relinquished his United States citizenship without regard to the citizen's specific intent to do so, where the Court decided this question twelve years ago in *Vance v. Terrazas*, 444 U.S. 252 (1980), and held that citizenship may be lost only if the trier of fact concludes that the citizen voluntarily committed an expatriating act with the specific intent to relinquish his citizenship?

2. Should the Court review this case in order to change existing law and establish one test for determining loss of citizenship for expatriation proceedings and a different test for determining citizenship for the purposes of diversity jurisdiction, where an unambiguous statute provides for a uniform rule?

3. Should the Court review the question whether a dual citizen of the United States and Spain should be treated as an American citizen for purposes of diversity jurisdiction, where the issue arises at best infrequently and the principal ground urged as the basis for review was not presented to the District Court or the Court of Appeals?

STATEMENT PURSUANT TO RULE 29.1

Respondents Action S.A. and Deltamar Establishment state that they have no parent companies and also have no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTIONS PRESNTED . . . i

STATEMENT PURSUANT TO RULE 29.1 ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW 4

The Standard for Renunciation of Citizenship is Well-Settled and Unambiguous 4

The Court of Appeals Did Not Misapply the Rule Requiring a Showing of Specific Intent to Relinquish Citizenship to this Diversity Action 7

The Decision Of The Court Of Appeals Does Not Conflict With The Decisions Of Any Court Of Appeals On The Same Matter 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES **Page**

Action S.A. v. Marc Rich & Co.,
1992 U.S. Dist. Lexis 1874, 1992 WL 36138
(S.D.N.Y. Feb. 14, 1992) 3 n.2

Connecticut Nat'l Bank v. Germain,
60 U.S.L.W. 4222 (U.S. Mar. 9, 1992) 7

Delta Air Lines, Inc. v. August,
450 U.S. 346 (1981) 8

Perkins v. Elg,
307 U.S. 325 (1939) 8

Richards v. Secretary of State,
752 F.2d 1413 (9th Cir. 1985) 9

Sadat v. Mertes,
615 F.2d 1176 (7th Cir. 1980) (*per curiam*) 5, 8

Terrazas v. Haig,
653 F.2d 285 (7th Cir. 1981) (*per curiam*) 9

Terrazas v. Muskie,
494 F. Supp. 1017 (N.D. Ill. 1980),
aff'd sub nom. Terrazas v. Haig,
653 F.2d 285 (7th Cir. 1981) (*per curiam*) 9

Terrazas v. Vance,
577 F.2d 7 (7th Cir. 1978),
rev'd, 444 U.S. 252 (1980) 9

Vance v. Terrazas,
444 U.S. 252 (1980) . . . . . i, 2, 3, 5, 6, 9

STATUTES

8 U.S.C. § 1481(b) (1988) 4, 7

28 U.S.C. § 1332(a) (1988) 8

Pub. L. No. 99-653, 100 Stat. 3568 (1986),
as amended by Pub. L. No. 100-525,
102 Stat. 2618 (1988) 4 n.3

No. 91-1435

In the
Supreme Court of the United States
October Term, 1991

MARC RICH,

Petitioner,

—v.—

ACTION S.A. and DELTAMAR ESTABLISHMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

I.

This case is of little if any importance to anyone except the parties. The decision of the Court of Appeals does not resolve important questions of law that recur with any frequency. This is a case decided on its particular facts under well-settled law.

In short, the petition does not present any issues worthy of the Court's review. The Court should deny the petition.

II.

This action was commenced in 1983 by Action S.A. and Deltamar Establishment, two foreign corporations, against Marc Rich and Marc Rich & Co., Inc., for fraud, breach of fiduciary duty, breach of contract and unjust enrichment arising from a contract for the sale of rice. Plaintiff Action S.A. is a French corporation with offices in Paris. Plaintiff Deltamar Establishment is a Liechtenstein corporation with offices in Vaduz. Both plaintiffs trade in rice and other commodities. (Pet. 39a-40a.)[1/]

Petitioner Marc Rich became a naturalized United States citizen in 1947; at the time the action was commenced, he resided in New York City. Marc Rich & Co., Inc., which Rich controls, is a New York corporation with its principal place of business in New York City. (Pet. 39a–40a.) Federal jurisdiction over this action is based on diversity. (Pet. 39a–40a.)

Rich did not answer the complaint. Instead, after plaintiff moved for a default judgment, Rich entered a limited appearance opposing the default on the ground that the District Court lacked subject matter jurisdiction. Rich alleged that he had obtained Spanish citizenship in 1982 and had renounced his United States citizenship at that time. On the basis of this claim, Rich argued that complete diversity between the parties was lacking. (A. 634–35; 2826.)

The District Court held an evidentiary hearing to determine Rich's citizenship. The court applied the well-settled law governing the effectiveness of an alleged renunciation of citizenship, as announced by the Court in *Vance v. Terrazas*, 444 U.S. 252 (1980). In *Terrazas*, the Court held that an expatriating act results in the loss of citizenship only if the act is performed voluntarily and with the specific intent to relinquish citizenship. 444 U.S. 258-61.

[1/] Reference to "Pet. ___" are to Rich's Petition for a Writ of *Certiorari*. References to "A. __" are to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

On the basis of the full factual record developed at the evidentiary hearing, the District Court found that Rich had not relinquished his American citizenship and that he was a United States citizen at the time this action was commenced against him in 1983. (Pet. 12a-30a.) Accordingly, the court granted plaintiffs' motion for a default judgment and, after an inquest on damages, entered judgment for the plaintiffs for $6,306,714.51, including compensatory damages, prejudgment interest and punitive damages. (A. 2526a-e.) The Court of Appeals agreed with the District Court's decision on the questions of citizenship, jurisdiction, Rich's default and compensatory damages; disagreed with the District Court's method of calculating prejudgment interest; and remanded for recalculation of prejudgment interest and punitive damages.[2/] (Pet. 1a-9a.)

III.

The questions presented in this petition are not novel or important or worthy of the Court's review for any other reason. The decision that Rich did not relinquish his United States citizenship prior to the time this action was commenced was based on a fact-intensive determination of no broad significance. Moreover, the question was correctly decided under clear legal standards announced by the Court. Rich's view that a citizen's execution of an oath of renunciation of United States citizenship establishes conclusively the person's specific intent to relinquish United States citizenship conflicts squarely with the Court's decision in *Vance v. Terrazas*, 444 U.S. 252 (1980), which rejected this precise claim. There is no reason to review this question anew.

A second issue raised by the petition—whether, assuming that Rich was a dual national, his American citizenship controls for purposes of diversity jurisdiction—was also correctly decided in accordance with precedent. Moreover, the arguments advanced by

---

[2/] On remand, the District Court recalculated prejudgment interest, reducing the amount from $4,110,254.25 to $1,694,080.05, and increased the award of punitive damages from $500,000.00 to $1,500,000.00. *Action S.A.* v. *Marc Rich & Co.*, 1992 U.S. Dist. Lexis 1874, 1992 WL 36138 (S.D.N.Y. Feb. 14, 1992).

Rich in the petition urging review of this question were not presented either to the District Court or the Court of Appeals. Finally, the decision presents no conflict with decisions of this or other federal courts.

REASONS FOR DENYING THE WRIT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW

The Standard for Renunciation of Citizenship is Well-Settled and Unambiguous

The law governing the renunciation of United States citizenship is well-settled.

As the party alleging loss of citizenship, Rich was required to provide evidence establishing that loss. The law is unambiguous:

> *Whenever* the loss of United States nationality is put in issue in *any* action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter *or any other Act*, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence.

8 U.S.C. § 1481(b) (1988) (emphasis supplied).[3/]

The Court has recently and definitively interpreted this statutory provision and has held that, for an alleged renunciation of citizenship to be effective, "the trier of fact must in the end

---

[3/] In 1986, 8 U.S.C. § 1481(c) was redesignated 8 U.S.C. § 1481(b), and its language was amended in a manner not relevant to this proceeding. Pub. L. No. 99-653, § 19, 100 Stat. 3568 (1986), *as amended by* Pub. L. No. 100-525, § 8(n), 102 Stat. 2618 (1988). Although Rich cites to 8 U.S.C. § 1481(c) throughout his petition, respondents employ the provision's current citation.

conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship." *Vance* v. *Terrazas*, 444 U.S. at 261. Moreover, an expatriating act results in loss of citizenship only if performed with the specific intent to relinquish citizenship. *Vance v. Terrazas*, 444 U.S. at 258-61. Specific intent may be "expressed in words or . . . found as a fair inference from proved conduct." 444 U.S. at 260; *accord Sadat v. Mertes*, 615 F.2d 1176, 1181 (7th Cir. 1980) (*per curiam*). Consequently, "the question whether citizenship has been voluntarily relinquished is to be determined on the facts of each case. . . ." *Vance v. Terrazas*, 444 U.S. at 266.

The District Court and the Court of Appeals did not depart from these well-settled and straightforward principles of law. The fact that Rich swore an oath of renunciation to obtain Spanish citizenship did not conclusively establish the loss of his United States citizenship. Indeed, the argument repeatedly pressed by Rich below and here—that the mere commission of an expatriating act specified in the statute, without more, is conclusive evidence of relinquishment of citizenship—was directly addressed and rejected by the Court in *Terrazas*. There, a United States citizen declared allegiance to a foreign state and "expressly renounc[ed] United States citizenship. . . ." 444 U.S. at 255. The government argued, as Rich does here, that the renunciation of United States citizenship coupled with swearing allegiance to a foreign power is "so contrary to undivided allegiance to this country that it could result in loss of citizenship without regard to the intent of the actor. . . ." 444 U.S. at 261. The Court held:

> [W]e are confident that it would be inconsistent with [prior law] to treat the expatriating acts specified in [8 U.S.C.] § 1481(a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen.

444 U.S. at 261.

In so holding, *Terrazas* squarely rejected the argument that the mere commission of an expatriating act is enough to destroy

citizenship. To determine the question, the trial court must examine all of the circumstances to determine the actor's intent. 444 U.S. at 266.

The courts below properly concluded that the citizen in this particular case did not intend to relinquish his citizenship. The record showed that for nearly four decades following Rich's naturalization in 1947, he enjoyed the benefits of citizenship in this country. In 1982, Rich learned that he had become a target of a criminal investigation by the United States Government; he immediately sought to obtain a foreign passport to facilitate his flight in case of indictment.[4] By the summer of 1982, Rich had acquired a Spanish passport for just such a contingency. (A. 885-89.) To obtain it, Rich mouthed ritualistic words of loyalty to Spain, but in doing so, he did not intend to renounce his United States citizenship. At best, Rich tried to play a shell game in which he could claim United States citizenship as necessary to protect himself against criminal prosecution or to facilitate his own business and financial interests. Time and again, after the summer of 1982 Rich declared by word and conduct that he *was* a United States citizen. (*See, e.g.*, Pet. 3a-5a; 14a-30a; A. 640-48; 705; 1007 at ¶ 7; 1237 at ¶ 6.)

Thus, in Swiss litigation, which Rich himself instituted in May 1983, seeking an order compelling a Swiss company of which he was a director to produce documents to the United States grand jury, Rich claimed he was a United States citizen to advance his cause. (Pet. 3a; 17a-20a; A. 640-48; 685 at ¶ 2; 695-703.) Further, throughout 1983—indeed, until the spring of 1985—Rich held himself out to the business community in Switzerland as a United States citizen by listing himself as such in the Commercial Register of Zug. (Pet. 4a; 22a-23a; A. 705; 1007 at ¶ 7; 1237 at ¶ 6.) Moreover, between the summers of 1982 and 1983, Rich claimed United States citizenship by entering this country on a

---

[4] On September 19, 1983, a grand jury sitting in the United States District Court for the Southern District of New York returned a 51-count indictment against Rich charging him with numerous violations of federal law. (A. 2745-2800.) Rich is a fugitive from this indictment. (A. 636-39 at ¶¶ 7-8; 1045; 2854.)

United States passport and not as an alien. (Pet. 3a; 20a-22a; A. 727-28; 733-37; 1015-43; 1022-23.) And finally, Rich failed in the spring of 1983 to respond to an inquiry from the United States Embassy in Madrid in regard to his citizenship. (Pet. 3a; 16a-17a; 52a-65a.) Rich delayed acknowledging a renunciation of his United States citizenship until November, 1984 (Pet. 66a-71a), supporting the District Court's finding that "Rich intended to defer making his renunciation of U.S. citizenship to the U.S. government—all with a view of continuing U.S. citizenship as long as it suited his various purposes." (Pet. 20a.)

In sum, there was ample evidence from which the District Court and the Court of Appeals could conclude that in 1982, when Rich acquired Spanish citizenship, he did not intend to renounce his American citizenship. This factual determination, which was correctly made and is of little interest to anyone other than the parties, does not warrant attention by the Court.

The Court of Appeals Did Not Misapply the Rule Requiring a Showing of Specific Intent to Relinquish Citizenship to this Diversity Action.

Rich claims that the expatriation statute and the requirement set forth in *Terrazas* that specific intent to relinquish United States citizenship be shown before citizenship is lost apply only in expatriation proceedings, not in challenges to diversity jurisdiction. (Pet. 12-17.) This argument is groundless.

The plain language of the statute makes it applicable "[w]henever the loss of United States nationality is put in issue in any action or proceeding commenced . . . under, or by virtue of, the provisions of this chapter or any other Act. . . ." 8 U.S.C. § 1481(b) (1988). Thus, by its terms, the statute applies to diversity cases in which loss of citizenship is made an issue. In view of the lack of ambiguity, there is no reason to treat this as the extraordinary case that requires consideration of the drafters' intent. *Connecticut Nat'l Bank v. Germain*, 60 U.S.L.W. 4222, 4223 (U.S. Mar. 9, 1992). Even so, the legislative history of the

expatriation statute does not support Rich's contention that the statute, and by implication, the decision in *Terrazas*, were intended to apply only to proceedings to determine citizenship for purposes of expatriation. Nowhere does the legislative history state that the statutory provisions do not apply to cases in which citizenship must be determined for purposes of diversity jurisdiction.

Rich's cry that the decision of the Court of Appeals, if unreversed, will increase the caseload of federal courts by "sweeping" into the federal system numerous commercial disputes between aliens and ex-citizens, is a false alarm. There is no reason to believe that there is a large pool of alien claimants waiting to sue ex-citizens in federal court. In any event, the decision of the Court of Appeals has nothing to do with *ex*-citizens; at the time plaintiffs sued Rich he was still a United States citizen.

Rich's other professed concerns for the administration of justice in the federal courts are equally exaggerated. Foreign governments are not likely to be offended by the Court of Appeals' ruling, which does not change existing law. Because the United States recognizes dual nationality, *Perkins v. Elg*, 307 U.S. 325, 329 (1939), Spain could determine that Rich had become a Spanish national in 1982, and a court in the United States could still determine, as it did here, that, as of August 1983, Rich did not do everything necessary to renounce his United States citizenship. As a dual national, if Rich was one, the District Court still had subject matter jurisdiction over the action because dual citizens are regarded as United States citizens for purposes of diversity. *Sadat v. Mertes*, 615 F.2d at 1187.

Rich claims that this rule of law should be reconsidered by the Court because the treatment of individual dual nationals for purposes of determining citizenship under the diversity statute, 28 U.S.C. § 1332(a) (1988), conflicts with the way in which the citizenship of corporations, partnerships and unincorporated associations with multiple citizenship are determined for diversity purposes. However, Rich never made this argument in the lower courts and he is foreclosed from presenting it to this Court in the first instance. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362

(1981). Moreover, individuals are treated differently from business entities under American law for many purposes. That this is so in determining citizenship for purposes of diversity jurisdiction does not make the question worthy of review.

The Decision Of The Court Of Appeals Does Not Conflict With The Decisions Of Any Court Of Appeals On The Same Matter

Finally, Rich argues that the decision of the Court of Appeals conflicts with *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981) (*per curiam*), and *Richards v. Secretary of State*, 752 F.2d 1413 (9th Cir. 1985). These cases, however, in which courts found that loss of citizenship occurred, involve very different factual circumstances than those presented here.

In *Terrazas v. Haig*, the trial court found (and the Seventh Circuit affirmed) that Terrazas had intentionally relinquished his citizenship *not only* by swearing an oath of loyalty to Mexico and concurrently renouncing his allegiance to the United States, but also by his "course of conduct" afterward, in which he traveled to the United States on a Mexican passport, actively sought the issuance of a Certificate of Loss of United States Nationality, and sought to inform the United States draft board of his purported loss of citizenship. *Terrazas v. Vance*, 577 F.2d 7, 8-9 (7th Cir. 1978), *rev'd on other grounds*, 444 U.S. 252 (1980); *Terrazas v. Muskie*, 494 F. Supp. 1017, 1018-19 (N.D. Ill. 1980) (on remand from *Vance v. Terrazas*, 444 U.S. 252 (1980)), *aff'd sub nom. Terrazas v. Haig*, 653 F.2d 285, 288 (7th Cir. 1981) (*per curiam*). In *Richards v. Secretary of State*, 752 F.2d 1413 (9th Cir. 1985), the Circuit Court determined that Richards lost his citizenship when he took an oath of loyalty to Canada, which included a renunciation of United States citizenship, *and* where he took no action afterward inconsistent with an intent to renounce. The Ninth Circuit explained that "[w]e agree . . . that the voluntary taking of a formal oath that includes an exclusive renunciation of United States citizenship is *ordinarily* sufficient to establish a specific intent to renounce United States citizenship. We also believe that there are no factors here that would justify a different result." 752 F.2d at 1421 (emphasis

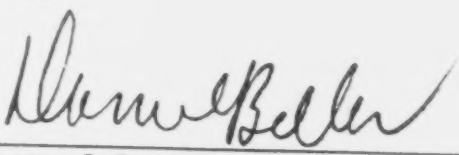
supplied). In contrast to these cases, Rich's repeated invocation of the benefits of United States citizenship after his alleged renunciation are factors that *do* justify a different result in this case.

Significantly, each of these cases shows that not only is there no conflict between the circuits on the law governing expatriation, but circuits are in agreement that the determination whether a person has expatriated himself turns on the facts of each particular case – not just on mouthing the words of renunciation. This consideration alone makes this case unworthy of review on *certiorari*.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* to the United States Court of Appeals for the Second Circuit should be denied.

Dated: New York, New York
April 6, 1992



DANIEL J. BELLER
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Counsel of Record for Respondents

Of Counsel:

Gidon M. Caine
Jill M. Wheaton
PAUL, WEISS, RIFKIND, WHARTON & GARRISON

Supreme Court, U.S.
FILED
APR 14 1992
OFFICE OF THE CLERK

(3)

No. 91-1435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARC RICH,

Petitioner,

vs.

ACTION S.A. and DELTAMAR ESTABLISHMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ANDREW L. DEUTSCH
Counsel of Record
CAROL M. FISCHER
ROBERT A. MEISTER
MILGRIM THOMAJAN & LEE P.C.
53 Wall Street
New York, New York 10005
(212) 858-5300

Attorneys for Petitioner

13

TABLE OF CONTENTS

The Court has Already Definitively Construed 8 U.S.C. §1481(c) 1

Terrazas and *Richards* Are Not Distinguishable on Their Facts 4

The Court Should Review the "Dual Citizenship" Question 6

Conclusion 7

TABLE OF AUTHORITIES

Cases:

American Hospital Ass'n v. N.L.R.B.,
111 S. Ct. 1539 (1991) 3

Ardestani v. I.N.S.,
112 S. Ct. 515 (1991) 2

Astoria Federal Savings and Loan Ass'n v. Solimino,
111 S. Ct. 2166 (1991) 3

Bender v. Williamsport Area School Dist.,
475 U.S. 534 (1986) 6

Cotton Petroleum Corp. v. New Mexico,
490 U.S. 163 (1989) 6

Dewsnup v. Timm,
112 S. Ct. 773 (1992) 3

Edmonds v. Compagnie Generale Transatlantique,
443 U.S. 256 (1979) 3

Edsell v. Mark,
179 F. 292 (9th Cir. 1910) 5

Federal Power Commission v. Sunray DX Oil Co.,
391 U.S. 9 (1968) 6

Freytag v. C.I.R.,
111 S. Ct. 2631 (1991) 2

TABLE OF AUTHORITIES - Continued

Gainesville v. Brown-Crummer Investment Co.,
277 U.S. 54 (1928) 6

Glidden Company v. Zdanok,
370 U.S. 530 (1962) 6

Hilton v. South Carolina Public Railways Com'n,
112 S.Ct. 560 (1991) 3

Holmes v. Securities Investor Protection Corp.,
60 U.S.L.W. 4225 (U.S. Mar. 24, 1992) 2

Jenkins v. Georgia,
418 U.S. 153 (1974) 6

Kahane v. Schultz,
653 F. Supp. 1486 (E.D.N.Y. 1987) 5

King v. St. Vincent's Hospital,
112 S. Ct. 570 (1991) 2

Lake Country Estates, Inc. v.
Tahoe Regional Planning Agency,
440 U.S. 391 (1979) 6

Mansfield, C. & L. M. R. Co. v. Swan,
111 U.S. 379 (1884) 6

Murarka v. Bachrack Bros, Inc.,
215 F.2d 547 (2d Cir. 1954) 3

TABLE OF AUTHORITIES - Continued

Nishikawa v. Dulles,
356 U.S. 129 (1958) 2

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 3

Philbrook v. Glodgett,
421 U.S. 707 (1975) 2

Raley v. Ohio,
360 U.S. 423 (1959) 6

Richards v. Secretary of State,
752 F.2d 1413 (9th Cir. 1985) 1, 4, 5

Runyon v. McCrary,
427 U.S. 160 (1976) 3

Terrazas v. Haig,
653 F.2d 285 (7th Cir. 1981) 1, 4

Terrazas v. Vance,
577 F.2d 7 (7th Cir. 1978) 4

Thurston Motor Lines, Inc. v.
Jordan K. Rand, Ltd.,
460 U.S. 533 (1983) 2

Tiobb v. Radloff,
111 S. Ct. 2197 (1991) 2

TABLE OF AUTHORITIES - Continued

Vance v. Terrazas,
444 U.S. 252 (1980) . . . . . *passim*

Statutes, Codes and Regulations:

8 U.S.C. §1481(c) (1982) . . . . . *passim*

Respondents avoid most of the arguments which the Petition advances. Rather, through a series of misstatements of the law and the record facts, they seek to divert the Court's attention from the untenable reasoning of the court of appeals. Petitioner responds briefly to correct those misstatements.

Respondents wrongly argue that this is a "fact-intensive" case presenting no issue worthy of review. (Opp. Br. 3).* In truth, the case presents purely legal questions of broad applicability. The decision below conflicts with this Court's decision in *Vance v. Terrazas*, 444 U.S. 252 (1980) ("*Terrazas*") that Congress intended former 8 U.S.C. §1481(c) only to prescribe the burden borne by the Government in expatriation proceedings. The ruling conflicts equally sharply with the rulings of the Seventh Circuit in *Terrazas v. Haig*, 653 F.2d 285 (7th Cir. 1981) and the Ninth Circuit in *Richards v. Secretary of State*, 752 F.2d 1413 (9th Cir. 1985) that an oath of renunciation, given at the time of an expatriating act, establishes the "intent to expatriate" requirement of *Terrazas*. These conflicts present compelling reasons for review by this Court.

The Court has Already Definitively Construed 8 U.S.C. §1481(c)

Respondents claim that the Court should not review the Second Circuit's application of §1481(c) to diversity disputes. They argue that the ruling below was justified under the "plain language" doctrine of statutory interpretation. (Opp. Br. 7). Respondents entirely miss the point. The purpose of this Court's statutory interpretation is

---

* References to "Pet." are to the Petition for a Writ of Certiorari. References to "Opp. Br." are to Respondents' Brief in Opposition. References to "A. __" are to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

"to ascertain the congressional intent and give effect to the legislative will" behind a statute. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). The plain language doctrine comes into play only where this Court has never before interpreted Congress's intent in enacting a particular federal statute. But the Court authoritatively determined the congressional intent behind §1481(c) in *Terrazas*, more than a decade ago. It found Congress's "evident aim" in enacting §1481(c) to be alteration of the holding in *Nishikawa v. Dulles*, 356 U.S. 129 (1958), that in expatriation proceedings the Government bears the burden of proof by clear and convincing evidence. 444 U.S. at 264 n.8.

The Second Circuit ignored *Terrazas*' clear holding that §1481(c) was intended to affect only expatriation proceedings. It extended the statute's scope to a field Congress did not intend to reach: diversity jurisdiction. Thus, the guiding jurisprudential principle here is not "plain language" but the obligation of lower federal courts to follow this Court's precedential interpretation of a federal statute. *See, e.g., Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).*

---

* Respondents also misstate the Court's approach to statutory interpretation. Less than a month ago, the Court held that when it is unlikely that Congress intended a statute to be applied literally, because doing so would upset a long-established judicial principle, "the key to the better interpretation" lies in reviewing the statute's legislative history. *Holmes v. Securities Investor Protection Corp.*, 60 U.S.L.W. 4225, 4227-8 (U.S. Mar. 24, 1992). In *Terrazas* itself, the Court's interpretation of §1481(c) rested on the clear statement of congressional intent contained in the House Report.

As the Court recently explained in *Ardestani v. I.N.S.*, 112 S. Ct. 515, 520 (1991), interpretation of a statute from "plain language" is rejected "when a contrary legislative intent is clearly expressed," as it is in this case. Even in cases where the statutory language has been allegedly clear, this Court has consulted legislative histories on numerous occasions to confirm whether Congress in fact accurately reflected its intent in its words. Most recently, *see, e.g., King v. St. Vincent's Hospital*, 112 S. Ct. 570, 575 n.14

(continued...)

Congress said nothing in the House Report in any way suggesting that §1481(c) was intended to affect the settled rule of *Murarka v. Bachrack Bros, Inc.*, 215 F.2d 547 (2d Cir. 1954), under which an individual is deemed a citizen of a foreign state for diversity purposes if so regarded by that state. This failure to speak is most significant, for this Court presumes that Congress does not intend a new statute to change a long-standing rule of law if "the reports and debates leading up to the [statute in question] contain not a word of this concept. This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979). *See also Dewsnup v. Timm*, 112 S. Ct. 773, 777 (1992) (where nothing in legislative history indicated Congress intended a change in prior law, no such intention inferred); *American Hospital Ass'n v. N.L.R.B.*, 111 S. Ct. 1539, 1544 (1991) (same). Respondents argue to the contrary (Opp. Br. 7-8), but, not surprisingly, cite no authorities in support.

There should be no deviation from "the well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes," *Runyon v. McCrary*, 427 U.S. 160, 175 (1976); *accord, Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation...."). *See also Hilton v. South Carolina Public Railways Com'n*, 112 S.Ct. 560, 563-64 (1991). The Court should thus review the decision below, which ignored both *Terrazas*' controlling interpretation of §1481(c) and the

---

*(...continued)
(1991); *Freytag v. C.I.R.*, 111 S. Ct. 2631, 2636 (1991); *Tiobb v. Radloff*, 111 S. Ct. 2197, 2200 (1991); *Astoria Federal Savings and Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2172 (1991).

principle that a statute will not be interpreted to repeal long-standing rules of decision unless Congress makes clear its intention to do so.

Terrazas and _Richards_ Are Not Distinguishable on Their Facts

The Court should also reach the purely legal question of whether the Second Circuit's opinion should stand in light of the contrary rulings by the Seventh Circuit in *Terrazas v. Haig* and the Ninth Circuit in *Richards*. Respondents contend that *Terrazas v. Haig* and *Richards* are factually distinguishable in that the individuals there did not invoke a claim to United States citizenship after their expatriating acts. (Opp. Br. 9-10). In fact, after Terrazas swore an oath renouncing U.S. citizenship, he made two statements that he did not intend to relinquish his rights as an American citizen in taking Mexican nationality; these assertions were given no weight in view of his explicit renunciation of U.S. citizenship at the time of taking Mexican nationality. *See Terrazas v. Vance*, 577 F.2d 7, 9 (7th Cir. 1978); *Terrazas, supra*, 444 U.S. at 256 ("[P]roceedings were instituted to determine whether appellee had lost his citizenship by obtaining the certificate of Mexican nationality. Appellee denied that he had...."). The Ninth Circuit also found that Richards' oath of renunciation of U.S. citizenship when he became a Canadian citizen trumped his *post hoc* assertions that he did not have the required specific intent. 752 F.2d at 1420-22.

Richards and *Terrazas v. Haig* undercut respondents' attempted fact distinction in another manner. They emphasize that the relevant statements of renunciatory intent are those made by the party *at the time* of his expatriating acts. *Richards*, 752 F.2d 1413, 1420 n.5; *Terrazas v. Haig, supra*, 653 F.2d at 288 ("[C]ircumstantial evidence

surrounding the commission of a voluntary act of expatriation may establish the requisite intent to relinquish citizenship"). *See also Kahane v. Schultz*, 653 F. Supp. 1486, 1493 (E.D.N.Y. 1987) (relevant evidence of intent is "the conduct closest in time to the act"). In contrast -- and further showing a true conflict between circuits -- the Second Circuit ignored Mr. Rich's unambiguous sworn declaration, contemporaneous with his Spanish naturalization, that he was renouncing his "USA nationality" (Pet. 76a), and credited only evidence allegedly arising from nine months to more than two years after his naturalization.*

---

* Respondents' brief grossly mischaracterizes much of the "evidence" of petitioner's intent in the record. There was no finding or evidence that Mr. Rich took Spanish citizenship in 1982 to facilitiate flight from an anticipated indictment. *Cf.* Opp. Br. 6. The district court flatly refused to draw such an inference from the facts when respondents' counsel requested it. (A. 1489-90). The argument is, moreover, irrelevant: "an alleged expatriate's 'specific intent' to renounce his citizenship does not turn on his motivation." *Richards, supra*, 752 F.2d at 1422.

Respondents' claim that "Rich held himself out to the business community in Switzerland by listing himself as such in the Commercial Register of Zug" (Opp. Br. 6) conflicts with the district court's conclusion that Mr. Rich himself had no role in entering or updating entries in the Register and that the Register was therefore not significant evidence on the question of his intent to expatriate. (Pet. 23a).

The assertion that Rich claimed to be a United States citizen in Swiss litigation in May 1983 (Opp. Br. 6-7) -- while having no bearing on his intent in August 1982, the important date -- again distorts the record. Mr. Rich's Swiss lawyer gave sworn evidence that *he* drafted the statement in reliance on the entry in the Zug Commercial Register, and did not review the representation with Mr. Rich before filing the complaint. (A. 1188). Respondents never contradicted this evidence.

Finally, respondents' assertion that Mr. Rich "claimed U.S. citizenship" by alleged use of a U.S. passport (Opp. Br. 6-7) is simply wrong. At the relevant time, issuance of a passport by the Department of State was not evidence that the bearer was a citizen of the United States, *Edsell v. Mark*, 179 F. 292, 293 (9th Cir. 1910). By the same token, travelling on a U.S. passport was not then equivalent to a "claim" of U.S. citizenship.

The Court Should Review the "Dual Citizenship" Question

Respondents do not address the remaining legal question -- how is a dual citizen to be treated in diversity disputes -- except to argue that this Court should not decide it because it was allegedly not raised below by petitioner. (Opp. Br. 8-9). But that question was unequivocally reached and decided by the court of appeals. (Pet. 5a-6a). Thus, regardless of whether petitioner advanced the argument below, that question is properly before this Court for review. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 n.11 (1989); *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Federal Power Commission v. Sunray DX Oil Co.*, 391 U.S. 9, 49 n.45 (1968); *Raley v. Ohio*, 360 U.S. 423, 436 (1959).

Assuming *arguendo* that the court of appeals had never ruled on this issue, it would still be properly raised on this appeal due to the fundamental importance of federal subject matter jurisdiction. As this Court has held, "[w]hether diversity of citizenship exists may be questioned in direct review for the first time in this Court." *Glidden Company v. Zdanok*, 370 U.S. 530, 537 (1962). *See also Gainesville v. Brown-Crummer Investment Co.*, 277 U.S. 54, 59 (1928); *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884). In fact, questions concerning the lack of subject matter jurisdiction are so important that they may be raised by the Court itself even if none of the parties below has previously raised the issue. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 399 (1979).

Conclusion

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the court of appeals.

Respectfully submitted,

ANDREW L. DEUTSCH
53 Wall Street
New York, New York 10005
(212) 858-5300

Counsel of Record and
Attorney for Petitioner
Marc Rich

Of Counsel:

MILGRIM THOMAJAN & LEE P.C.
Carol M. Fischer
Robert A. Meister